Supreme Court, U.S.
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NO.

IN THE
SUPREME COURT OF THE UNITED STATES

BENJAMIN A. RATNER AND BETH HANEY,
Petitioners,

v.

LOUDOUN COUNTY PUBLIC SCHOOLS,
EDGAR B. HATRICK, HARRY E. BIBB,
JOSEPH L. MAUCK, AND ROBERTA GRIFFITH,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Does the long-term suspension of a public school student for "weapons possession" in furtherance of the school's "Zero Tolerance" policy against such possession, despite the student's absence of intent to "possess" the weapon or to cause harm to others, violate the student's fundamental right to due process and/or equal protection under the Fourteenth Amendment?

II. What process is due a public school student who is subjected to a long-term suspension in excess of ten days pursuant to *Goss v. Lopez*, 419 U.S. 565 (1975)?

PARTIES TO THE PROCEEDINGS

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PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioners Ben Ratner and Beth Haney respectfully petition this Honorable Court for a writ of certiorari to review the decision of the United States Court of Appeals for the Fourth Circuit in *Ratner v. Loudoun County Public Schools, et al.*, No. 00-2157 (July 30, 2001). Petitioners seek review of the Court of Appeals' affirmance of the dismissal of their lawsuit for failure to state a claim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure based upon the lower courts' determination that no violation of the due process and equal protection guarantees of the Fourteenth Amendment occurs when a public school student is denied his state-created right to public education pursuant to an arbitrary and capricious "Zero Tolerance" disciplinary policy.

OPINIONS AND ORDERS BELOW

The decision of the Fourth Circuit Court of Appeals in *Ratner v. Loudoun County Public Schools, et al.*, No. 00-2157, dated July 30, 2001, is unpublished and appears as Appendix B hereto. The Judgment of the Court of Appeals, filed July 30, 2001, appears as Appendix C. The Fourth Circuit's Order Denying Petition for Rehearing and Rehearing *En Banc*, filed August 27, 2001, appears as Appendix A.

The Memorandum Opinion filed July 28, 2000 by the United States District Court for the Eastern District of Virginia in *Ratner v. Loudoun County Public Schools, et al.*, Civ. No. 00-944-A, is unpublished, and appears as Appendix E hereto. The

accompanying Order Granting Defendants' Motion to Dismiss, filed July 28, 2000, appears as Appendix D.

JURISDICTIONAL STATEMENT

Jurisdiction was had in the Eastern District of Virginia, Alexandria Division in the first instance, insofar as Petitioners' Complaint, filed June 8, 2000, stated claims arising under the Constitution and statutes of the United States. 28 U.S.C. § 1331. *See* App. F1 (Complaint). The District Court granted Respondents' motion to dismiss all claims pursuant to FED. RULE CIV. PROC. 12(b)(6) by Memorandum Opinion and Order dated July 28, 2000, which order constituted a final judgment. Appendix E1 (Memorandum Opinion); D1 (Order). Appeal was timely taken to the Fourth Circuit Court of Appeals pursuant to 28 U.S.C. § 1291 (appeal of a district court final judgment) by filing Notice of Appeal on August 24, 2000. FED. RULE APP. PROC. 4(a)(1)(A); Joint Appendix to Record on Appeal ("J.A.") at A4 (docket entry).

The Fourth Circuit affirmed by *per curiam* opinion dated July 30, 2001. Appendix B1. Petitioners timely filed a Petition for Reconsideration, or in the Alternative, for Rehearing En Banc within fourteen days thereof on August 13, 2001. *See* Rule 40(c) of the Local Rules of the Fourth Circuit (allowing such motions within 14 days of judgment). The Court of Appeals denied both petitions by order dated August 27, 2001. App. A1. The Supreme Court has jurisdiction to review the judgment in question on writ of certiorari in accordance with 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

UNITED STATES CONST. AMEND. XIV, § 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

20 U.S.C. § 8921, "Gun-Free Schools Act of 1994":

(b)(1) Each State receiving federal funds... shall have in effect a State law requiring local educational agencies to expel from school for a period of not less than one year a student who is determined to have brought a weapon to a school under the jurisdiction of local educational agencies in that State, except that such State law shall allow the chief administrating officer of such local educational agency to modify such expulsion requirements for a student on a case-by-case basis.

VA CODE ANN. § 22.1-277.01. Expulsion of students under certain circumstances; exceptions:

A. In compliance with the federal Improving America's Schools Act of 1994, Part F – Gun-Free Schools Act of 1994, a school board shall expel from school attendance for a period of not less than one year any student as such

school board has determined, ... to have brought a firearm onto school property or to a school-sponsored activity as prohibited by Sec. 18.2-308.1.

VA. CODE ANN. § 22.1-279.6. Guidelines for school board policies; school board regulations governing student conduct:

(B) School boards shall adopt and revise, in accordance with requirements of this section, regulations governing student conduct that are consistent with, but may be more stringent than, the guidelines of the Board. School boards shall include in the regulations governing student conduct, procedures for the suspension, expulsion and exclusion decisions and shall biennially review the model student conduct code to incorporate student discipline options and alternatives to preserve a safe nondisruptive environment for effective teaching and learning.

(C) The Board of Education shall establish standards to ensure compliance with the Improving America's Schools Act of 1994, Part F – Gun-Free Schools Act of 1994 in accordance with Sec. 22.1-277.07, to be effective on July 1, 1995.

Pertinent portions of the Loudoun County Public Schools Disciplinary Policy are set out as Appendix G hereto.

STATEMENT OF THE CASE

Introduction.

Petitioners alleged in their Complaint that Respondents acted pursuant to a written and/or *de facto* "Zero Tolerance" policy of Respondent Loudoun County Public Schools that possession of a "weapon" would result in automatic suspension regardless of circumstances, regardless of the student's record and personal conduct, and regardless of the student's intent. Petitioners further alleged that numerous procedural safeguards imposed by the Virginia Code to govern suspensions were not adhered to, to Petitioners' prejudice. The District Court and Court of Appeals held that the requirements of due process extended only to mandating some form of hearing before Respondent school board, and that imposition of a semester-long suspension without regard to intent in furtherance of the board's "Zero Tolerance" policy did not give rise to constitutional claims. Petitioners submit that the constitutional rights of due process and equal protection require much more; at a minimum, they require that when a state provides procedural safeguards for the rights of its citizens, it be required to adhere to such procedures, and that a citizen not be deprived of a state-created right absent consideration of the predicate circumstances and the culpability of his intent.

Factual History.

In October 1999, Petitioner Benjamin Ratner was an eighth-grade student at Blue Ridge Middle School, a school operated by Respondent Loudoun County Public Schools ("LCPS"). Memorandum Op., App. B2; Complaint, App. F3-F4, ¶ 10. Petitioner Ratner had been diagnosed as suffering from Attention

Deficit Hyperactive Disorder, a learning disability, and Respondent LCPS had been aware of this condition for several years preceding October 1999. App. F14-F15, ¶¶ 66 - 68. In response to Petitioner's disability, LCPS had made accommodations for Petitioner in his educational program, including placing him in remedial classes for learning disabled students, as well as providing additional attention and supervision during his regular classes. *Id.*

On October 8, 1999, Petitioner Ratner received a note from another eighth-grade student, Jillian Carlson, whom Ratner had known for two years. Memorandum Op., App. B2-B3; Complaint, App. F4, ¶¶ 11, 12. Petitioner was aware of Ms. Carlson's previous suicide attempts and her hospitalization for psychiatric problems. *Id.* In the note, Ms. Carlson stated that she had considered committing suicide by slitting her wrists the previous evening and that she had inadvertently brought the knife to school in her notebook binder. *Id.* Out of concern for Ms. Carlson's safety, Petitioner Ratner took the notebook binder containing the knife from Ms. Carlson and locked it in his school locker. Memo Op., App. B3; Complaint, App. F4, ¶¶ 12, 13. Petitioner intended to inform his and Ms. Carlson's parents about the incident upon returning home from school, so that they could make the appropriate response. *Id.*; Complaint, App. F4, ¶¶ 12 - 13.

By lunchtime, school officials learned that Ms. Carlson had brought a knife to school and may have given it to Petitioner. Fanny Kellogg, a Dean at Blue Ridge Middle School, summoned Petitioner from class and asked if he had the knife. *Id.*; Complaint, App. F5, ¶ 15. Petitioner readily admitted that he secured it in his locker. *Id.* As directed by Dean Kellogg, Ratner went unescorted to his locker, retrieved the book binder containing the knife, and gave it to Dean Kellogg. *Id.* Dean Kellogg reported that Petitioner

Ratner acted in what he perceived to be Ms. Carlson's best interests, and that Ratner never intended to harm anyone with the knife. *Id.* In fact, no Respondent has ever alleged that Petitioner intended to "possess" the knife to harm another, or that he posed a danger to any student; to the contrary, his behavior has been consistently commended.

Notwithstanding Dean Kellogg's conclusion, Respondent Griffith, the school's assistant principal, immediately issued a written notice suspending Petitioner Ratner from school for ten days for violating School Board Policy § 8-32. Complaint, App. F5, ¶ 16. However, the written notice of suspension was not provided to Respondent Hatrick or his designee, Respondent Bibb, as required by Virginia Code § 22.1-277.04 (1999). Complaint, App. F7, ¶¶ 26-27. The notice also failed to include information regarding alternative educational programs, in violation of Virginia Code § 22.1-277.03.A (1999), a particularly serious error in view of Petitioner's history of requiring special needs assistance under the IDEA. App. F8, ¶¶ 30, 31.

On October 12, 1999, Respondent Mauck affirmed in writing the decision to suspend Petitioner Ratner for ten days. Memorandum Op., App. B3; App. F5, Complaint, ¶ 17. This notice likewise failed to provide information regarding the availability of alternative educational programs, in violation of Virginia Code § 22.1-277.03.A (1999). App. F8, ¶ 32. Two days later, Respondent Hatrick issued a written notice of suspending Petitioner Ratner indefinitely pending a decision by the School Board. Memorandum Op., App. B3-B4; App. F5, Complaint, ¶ 18. This notice did not include information regarding Petitioner Ratner's right to appeal the decision to the school board, as provided for by Virginia Code § 22.1-277.03.B (1999). App.

F8-F9, ¶ 34. Nor, once again, did the notice provide information regarding the availability of alternative educational programs, as required by Virginia Code § 22.1-277.03.A (1999). App. F9, ¶ 38. Respondent Hatrick informed Petitioner Haney that he would recommend that Petitioner Ratner be suspended for the balance of the fall 1999 semester, and that any appeal of that decision should be taken to an Administrative Hearing Panel. *Id.*; App. F5, ¶ 18. Respondents encouraged Petitioner Ratner and Petitioner Haney to forego representation by counsel at such a hearing. App. F10, ¶ 42.

On October 28, 1999, an Administrative Hearing Panel, consisting of employees of Respondent LCPS who were not assigned to Blue Ridge Middle School, recommended that Petitioner Ratner be suspended for the balance of the Fall 1999 semester. Memo. Op., App. B4; Complaint, App. F6, ¶ 18. The following day, Respondent Hatrick adopted that recommendation and notified Petitioners. *Id.*; App. F6, ¶ 19. Petitioners requested a hearing before the School Board Discipline Committee, which was held on December 7, 1999. *Id.*; App. F6, ¶ 20. That committee unanimously approved the semester-long suspension, and Respondent Hatrick issued a notice of suspension consistent with that decision on December 10, 1999. *Id.*; App. F6, ¶ 21. The December 10, 1999 final notice did not advise Petitioners of their right to seek review in state circuit court, and in fact Petitioners lost the opportunity to do so. App. F9, ¶ 40. Petitioner Ratner remained suspended through the balance of the semester, February 1, 2000. App. F6, ¶ 22.

Procedural History.

Petitioners filed their Complaint in the United States District

Court for the Northern District of Virginia on June 8, 2000, alleging various causes of action for deprivations of civil liberties under color of state law pursuant to the Civil Rights Act, 42 U.S.C. §§ 1983 and 1988. *See* App. F1 (Complaint).

Respondents filed a motion to dismiss all claims pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure on July 5, 2000. The District Court granted the motion without a hearing by Order dated July 28, 2000. App. D1. Timely Notice of Appeal was filed by Petitioners pursuant to FED. R. APP. PROC. 4(a) on August 24, 2000. J.A. at A4.

The Panel did not discuss Petitioners' claims in any substantial fashion, instead merely stating, "we affirm substantially for the same reasons expressed by the district court in its opinion, *Ratner v. Loudoun County Pub. Sch.*, Civ. No. 00-944-A (E.D. Va. July 28, 2000)." App. B5. The Panel summarizes the District Court's decision thusly:

> [T]he district court concluded Ratner's claim was, in essence, a claim of due process violations. The district court also concluded, correctly, that the school officials gave Ratner constitutionally sufficient, even if imperfect, process in the various notices and hearings it accorded him, and we agree. *See Goss v. Lopez*, 419 U.S. 565, 581 (1975) (describing process due students in connection with suspensions from school).

Id. The Panel thus viewed Petitioners' claims as sounding in procedural due process, and held that they received all the process due under *Goss* because they were given multiple hearings.

Petitioner Filed a Petition for Rehearing and for Rehearing *En Banc*, seeking review by both the panel and, alternatively, the *en banc* Fourth Circuit. The petitions were denied August 27, 2001. App. A1. This Petition follows.

REASONS FOR GRANTING THE WRIT

Petitioners alleged more than sufficient facts to adduce that Petitioners were denied due process, insofar as they amply pled that statutory rights of notice and process under the Virginia Code were denied them, and that Respondents engaged in a course of conduct throughout the administrative proceedings below that has clearly exhibited a patent disregard for Petitioner Ratner's right to receive a free appropriate public education. Petitioners' Complaint likewise presented a well-pled cause of action for denial of equal protection based upon Respondents' arbitrary, capricious and vexatious conduct directed against Petitioners. The Supreme Court has held, and various courts of appeal and federal district courts have affirmed, that the right to equal protection extends to protect citizens from arbitrary, capricious and irrational government conduct directed at them specifically, and that a complaint that so pleads is not subject to dismissal for failure to state a claim.[1] *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000); *Allegheny Pittsburgh Coal Co. v. Commission of Webster Cty.*, 488 U.S.

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[1] Petitioners also appealed the dismissal of their Seventh and Eighth Causes of Action, for attorneys' fees and costs pursuant to 42 U.S.C. § 1988 and for punitive damages, respectively. Insofar as the dismissal of these claims was predicated on the dismissal of Petitioners' substantive claims under 42 U.S.C. § 1983, *see* Memorandum Opinion, App. E7 (remaining claims dismissed for absence of constitutional violation), appeal of the dismissal of these claims is also within the scope of this Petition.

336 (1989).

I. CERTIORARI SHOULD BE GRANTED TO RESOLVE A SPLIT AMONG THE CIRCUIT COURTS OF APPEAL CONCERNING WHETHER PUBLIC SCHOOL STUDENTS WHO ARE SUBJECTED TO ARBITRARY AND CAPRICIOUS DISCIPLINARY PROCEEDINGS MAY BRING DUE PROCESS AND/OR EQUAL PROTECTION CLAIMS UNDER THE FOURTEENTH AMENDMENT.

The Court of Appeals and concurring Judge Hamilton readily acknowledged that the policy caused a "harsh result" in this case, which result it declined to "judge." App. B5. In fact, as Judge Hamilton expanded,

> [Petitioner is] the victim of good intentions run amuck. Ratner's complaint alleges that school suspensions for possession of a weapon on Loudoun County school property are imposed automatically, pursuant to a zero-tolerance policy that precludes consideration of the facts and circumstances of a particular student's conduct in determining a violation of stated policy and the resulting student punishment.

App. B7. Judge Hamilton went on to observe:

> The panic over school violence and the intent to stop it has caused school officials to *jettison the common sense* idea that a person's *punishment should fit his crime* in favor of a *single harsh punishment*, namely, mandatory school suspension. Such a policy has *stripped away judgment and discretion* on the part of those administering it; refuting

> the well established precept that judgment is the better part of wisdom. *The facts do not offer even the hint of a suggestion that Ratner ever intended to personally possess the knife or harm anyone with it....*

App. B7 (emphases supplied). Judge Hamilton noted that *Goss v. Lopez*, 419 U.S. 565 (1975) mandates that "school officials may intrude upon the right to a free appropriate public education only in the most justifiable circumstances." App. B8. He observed:

> Under a facts/circumstances-sensitive examination of this case, *Ratner's nearly four-month suspension from middle school is not justifiable*. Indeed, it *is a calculated overkill* when the punishment is considered in light of Ratner's good-faith intentions and his, at best, if at all, *technical violation* of the school's policy.

Id. (emphasis supplied). It is hard to imagine language more strongly suggestive that the Loudoun County policy is arbitrary and capricious, and hence illegitimate. "Suffice it to say that the degree of Ratner's violation of school policy does not correlate with the degree of his punishment. Certainly, the oft repeated maxim, 'there is no justice without mercy' has been defiled by the results obtained here." *Id.* Judge Hamilton nonetheless concluded that "as the opinion for the court explains, this is not a federal constitutional problem." But the "opinion for the court" did not in fact explain why it was not a "constitutional problem," except to say that Respondent complied with all procedural due process requirements per *Goss*.

The Court of Appeals failed to apprehend that Petitioners' complaint alleged that the "Zero Tolerance" policy itself *mandates*

arbitrary and capricious results, and Petitioners accordingly requested declaratory and injunctive relief against the administration of the policy. App. F16, Complaint, ¶ (A) (Prayer for Relief). A municipal policy that is the "moving force" behind conduct alleged to deprive a party of his constitutional rights may be attacked both for facial invalidity and in its enforcement. *Board of Bryan County Comm'rs v. Brown*, 520 U.S. 397 (1997); *City of Newport v. Fact Concepts*, 453 U.S. 247 (1981); *Owen v. City of Independence*, 445 U.S. 622, *reh. den'd*, 446 U.S. 993 (1980). Dismissal on R. 12(b)(6) motion for failure to state a claim is not appropriate where any set of facts may exist to establish that the policy complained of or the acts taken pursuant to it deprived the claimant of his constitutional rights. 42 U.S.C. § 1983; *Leatherman v. Tarrant County Narcotics Intelligence*, 507 U.S. 163, 167-69 (1993) (notice pleading requirements "make no more demanding rule for pleading a complaint under § 1983 than for pleading other kinds of claims for relief").

Arbitrary and capricious disciplinary action gives rise to claims sounding in substantive due process and equal protection. "Of course, school officials cannot impose student punishment in a completely arbitrary and capricious manner. In order to establish a violation of a student's substantive, rather than procedural, due process rights, the student must show arbitrary and capricious conduct on the part of school officials." *Jordan v. O'Fallon Twp. High School Dist. No. 203*, 302 Ill. App. 3d 1070, 1080, 706 N.E.2d 137, 143 (5th App. Dist. 1999), citing *Robinson v. Illinois High School Ass'n*, 45 Ill. App.2d 277, 286, 195 N.E.2d 38, 43 (1963) and *Peterson v. Indep. School Dist. No. 811*, 999 F.Supp. 665, 673 (D. Minn. 1998). Conduct is arbitrary and capricious if there exists no rational basis for the decision *or* the decision is motivated by bad faith or ill will. *Hines v. Rinker*, 667

F.2d 699, 703 (8th Cir. 1981). *Cf. Lyons v. Penn Hills School Dist.*, 723 A.2d 1072 (Commonwealth Ct. of Pa. 1999) (upholding circuit court's reversal of expulsion for possessing pen knife on ground that "Zero Tolerance" policy denied Superintendent discretion to modify discipline). By refusing to permit Petitioners to obtain discovery on Respondents' state of mind, intent, and motivation in promulgating and enforcing their "Zero Tolerance" policy, the Court of Appeals denied them their right to establish pleading that would have been sufficient for an Equal Protection or Due Process claim, and thereby erred. "[T]he determination of whether the Board [of education's] action was rationally related to a legitimate state interest is one of law and would be made by the court. *The question of what the Board did, and why, would be questions of fact for the jury.*" *Seal v. Morgan*, 229 F.3d 567, 580 (2000), citing *Sameric Corp. v. City of Philadelphia*, 142 F.3d 582, 591 (3rd Cir. 1998) (noting the question of whether a governmental action is rationally related to a legitimate state interest is properly decided by the court, although questions regarding the officials' motivation, if the subject of a dispute of fact, are for the jury).

In marked contrast to the Fourth Circuit's *laissez-faire* approach to the constitutional issues raised by long-term suspensions is that of the Sixth Circuit Court of Appeals in *Seal v. Morgan, supra*, which held that students have constitutional claims of equal protection and/or substantive due process for school disciplinary decisions that are arbitrary and capricious. "As a matter of federal constitutional law... [a school] Board may not expel students from school arbitrarily or irrationally," that Circuit held. 229 F.3d at 579. In fact, it observed, "the right of public school students not to be expelled arbitrarily or irrationally has been clearly established since at least the Supreme Court's decision in

Goss v. Lopez...." 229 F.3d at 581 (citation omitted).

Seal involved an expulsion of a student for "possession" of a knife in the glove compartment of his mother's car that he had driven to school, despite that the record did not establish the student knew the knife was there (it had been put there by friends). 229 F.3d at 571. With reasoning strikingly similar to Respondents', the school board upheld Seal's suspension, with a member stating, "the problem I see is that we always have to be consistent in sending a clear message to students.... Justin [sic], you are responsible for what's in your car and that's where I'm torn but I would have to say that you have to be held responsible as a driver for what's in your car." *Id.* As in Petitioners' case, the student brought suit through his parents, alleging deprivations of his due process rights. The Sixth Circuit reversed summary judgment for the school board: "On the basis of the record presented, a reasonable trier of fact could conclude that Seal was expelled for a reason that would have to be considered irrational." *Id.* The Sixth Circuit observed that "In the context of school discipline, a substantive due process claim will succeed only in the 'rare case' when there is 'no "rational relationship between the punishment and the offense."'" *Id.* at 575, citing *Rosa R. v. Connelly,* 889 F.2d 435, 439 (2nd Cir. 1989). (Recall Judge Hamilton's words that in this case the punishment did not "fit the crime.") The Sixth Circuit concluded that "suspending or expelling a student for weapons possession, even if the student did not knowingly possess any weapon, would not be rationally related to any legitimate state interest." *Id.* Further, the Sixth Circuit's observation in that case perfectly mirrors Petitioners' allegation in this one: "Based on the evidence of record, it appears that nothing that Seal could have said at any of those [school board] hearings would have made one bit of difference." *Id.* at 579. The Fourth Circuit's decision to uphold Respondents' policy and

conduct, in the face of allegations that Respondents acted "arbitrarily" and "unreasonably" in suspending Ben Ratner without regard for the admittedly "noble" and "honorable" nature of his conduct, is accordingly in direct conflict with the Sixth Circuit's decision in *Seal*.[2] Certiorari is appropriate to address this conflict, and to give guidance to the Circuits in addressing this burgeoning area of due process jurisprudence.

II. CERTIORARI SHOULD BE GRANTED TO ALLOW THE COURT AN OPPORTUNITY TO CLARIFY FOR FEDERAL AND STATE COURTS WHAT PROCESS IS DUE STUDENTS SUBJECTED TO LONG-TERM SUSPENSION PURSUANT TO *GOSS V. LOPEZ*.

The District Court and Court of Appeals acknowledged that

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[2] The Panel Opinion is also in conflict with the Fourth Circuit's decision in *Hall v. Tawney*, 621 F.2d 607 (4th Cir 1980). *Hall* reviewed claims of deprivation of substantive due process arising out of a brutal beating of a school child pursuant to a corporal punishment discipline policy. *Id.* at 609. The Fourth Circuit explained that "a holding that the procedural due process afforded by a state incident to its intrusions upon a 'liberty' interest protected by the Fourteenth Amendment is constitutionally adequate for that purpose is obviously not a holding that the qualitatively different 'liberty' interest protected by substantive due process may not be violated by the challenged conduct." The Court reversed dismissal of this claim, advising that conduct that is "severe" or "disproportionate" to the offense may give rise to a due process claim. *Id.* at 613. In contrast, the Fourth Circuit panel below regarded Petitioners' case as virtually exclusively a procedural due process case, and refused to permit Petitioners to seek to establish in discovery that Respondents' conduct was severe, disproportionate and shocking to the conscience of the community.

numerous procedural deficiencies were pled in the Complaint. These include the lack of statutory notice provided to Petitioners of their right to appeal to circuit court, resulting in the loss of their right to appeal. *Cf. Bell v. Burson*, 402 U.S. 535, 542 (1971) (for purposes of satisfying due process, if an element essential to the decision is excluded from consideration, then the hearing is not meaningful); *Sieck v. Oak Park-River Forest High School Dist. No. 200,* 807 F.Supp. 73, 76 (N.D. Ill. 1992) (inherent in due process requirement of a hearing is the notion that a hearing be "meaningful"). *Cf. Wood by Wood v. Henry County Public Schools*, 255 Va. 85, 495 S.E.2d 255 (1998) (in order to enjoy right to be heard, parties must first be notified). Further, in cases of suspensions in excess of ten days, the three-factor test of *Mathews v. Eldridge,* 424 U.S. 319 (1976) should apply, not the less stringent standard of *Goss*. *See Craig v. Selma City Sch. Bd.*, 801 F.Supp. 585, 591 (S.D. Ala. 1992) (applying *Goss* for suspension under ten days and *Mathews* for expulsion). In spite of the fact that Petitioner Ratner's suspension was for an entire semester, not a mere ten days, the lower courts cited to *Goss* in holding that Petitioner received all the legal process that was due him. The courts below thus wholly failed to address "what process was due" in longer suspensions like Petitioner's. Both the Fourth Circuit in Petitioners' case and the Sixth Circuit in *Seal* struggled with the requirements of procedural due process because the Court has not clarified the issue in the quarter-century since *Goss*. *Seal*, 229 F.3d at 581 ("We do not believe that the contours of that right [announced in *Goss*] were sufficiently clear to put a reasonable school superintendent on notice in 1996 that a school disciplinary policy's lack of a conscious-possession requirement could produce irrational expulsions and thus violate the legal rights of students....") Certiorari is appropriate to allow the Court an opportunity to clarify for public school administrators, parents and students what process

is due students in imposing long-term suspensions.

III. Certiorari Should Be Granted to Address a Question of Exceptional Public Importance, Whether Constitutional Limitations May Be Imposed on Public School Districts' "Zero Tolerance" Disciplinary Policies.

As Judge Hamilton observed in concurrence with the Panel Opinion, Petitioners' case involves a question of exceptional public importance, that of whether constitutional limitations may be imposed on public school districts' "Zero Tolerance" disciplinary policies. Judge Hamilton noted that Loudoun County's "Zero Tolerance" policy, and others like it throughout the country, were adopted in large response to the tragic school shootings over the last several years. App. B7. Consequently, the issue of "Zero Tolerance" policies generally, and Petitioners' case specifically, has been the subject of immense commentary in the media and public discussion recently, most of it negative toward such policies.[3] The

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[3] *See, e.g.*, "Zero Tolerance Policies Lack Flexibility," *USA Today*, April 13, 1999; "Becoming Fed Up With Zero Tolerance," *NY Times*, September 3, 2000; "Yes, We Have No Tolerance," *NY Times*, March 16, 1997; "School Codes Without Mercy Snare Pupils Without Malice," *NY Times*, March 12, 1997; "Miss Manners, 1; Zero Tolerance, 0," *Chicago Tribune*, May 31, 2001; "Back to Zero on Tolerance," *Washington Times*, December 8, 1999; "Zero Tolerance Adds Up to Zero Wisdom," *Washington Times*, July 3, 2001; "Zero Tolerance, Zero Thinking," *Washington Times*, November 16, 1999; "Zero Tolerance Goes Awry in Loudoun County Schools," *Washington Times*, December 8. 1999; "Treatment of Honors Grad Spotlights 'Zero Tolerance' Flaws," *Washington Times*, May 27, 2001; "Bar Assn. Asks End to Zero Tolerance," *Los Angeles Times*, February 20, 2001; "Group Opposes Zero Tolerance

American Bar Association has taken a position opposing the implementation of such policies, stating,

> [T]he ABA opposes, in principle, "zero tolerance" policies that have a discriminatory effect, or mandate either expulsion or referral of students to juvenile or criminal court, without regard to the circumstances or nature of the offense or the student's history.

School Policies," *Los Angeles Times*, February 20, 2001; "Child Suspended for Brandishing Chicken," *Los Angeles Times*, February 1, 2001; "Some Districts Easing Rules on Discipline," *Los Angeles Times*, February 19, 2001; "Getting Too Tough?" *Los Angeles Times*, February 24, 1999; "Taking Zero Tolerance to the Limit," *Los Angeles Times*, March 1, 1998; "Good Deed Gets Va. Teen Suspended Over Knife," *Washington Post*, December 8, 1999, at B1; "A Good Deed Goes Punished," *Washington Post* Editorial; "Zero Tolerance, Zero Sense," *Washington Post*, June 19, 2000, A17; "No to Zero-Tolerance," *Washington Post*, January 14, 2000, A27; "Zero Tolerance, Zero Judgement," *Washington Post*, December 2, 1999, A39; "Zero Tolerance Policy is Hurting Civil Rights More Than it's Helping Schools," *Minneapolis Star-Tribune*, October 31, 2000; "Discretion, Not Zero Tolerance," *Minneapolis Star-Tribune*, May 13, 2000; "As Common Sense Fades, Bureaucracy Takes Over," *Minneapolis Star-Tribune*, December 26, 2000; "When Zero Tolerance Hits at Common Sense," *Minneapolis Star-Tribune*, October 31, 1999; "Up-Tight Educators are Slave to Rules - Logic is Jettisoned," *Miami Herald*, December 16, 1999; "From Our Readers: Zero Tolerance Can Go Too Far," *Detroit Free Press*, June 30, 2001; "Zero Tolerance Law at Schools Disputed Interpretations Too Broad, Some Contend," *Detroit Free Press*, January 29, 2001; "Zero Common Sense Holt High School Takes a Tough Rule to a Pointless Extreme on Expulsion," *Detroit Free Press*, June 23, 2001. Petitioners' case was also the subject of a feature length news story on *Dateline NBC*.

ABA House of Delegates Resolution 103B (2000). As one legal scholar has remarked, "Zero tolerance represents a move toward strict discipline of a few scapegoats in a failed attempt to make schools safer." *Zero Tolerance: The Alternative is Education*, Paul M. Kingery, Hamilton Fish Institute (1999).

Frequently, state and local education officials enact such policies out of an inordinate concern that their federal funding under the federal Gun Free Schools Act would be imperiled if they were perceived to have "tolerated" the "possession" of a weapon on school grounds. 20 U.S.C. § 8921(b)(1) (mandating public schools receiving federal funds require expulsion of students bringing a weapon to school); VA. CODE ANN. § 18.2-308.1 (Possession of a firearm, stun weapon or other weapon on school property prohibited); § 22.1-277.01 (Expulsion required for possessing certain weapons). Numerous states have enacted similar "Zero Tolerance" mandates. Florida's "Zero Tolerance" statute is illustrative:

> 230.235 Policy of zero tolerance for crime.
>
> (1) Each school district shall adopt a policy of zero tolerance for crime and substance abuse pursuant to this section....
>
> (2) The policy shall require students found to have committed one of the following offenses to be expelled, with or without continuing educational services, from the student's regular school for a period of not less than 1 full year, and to be referred for criminal prosecution:
>
> (a) Bringing a firearm or weapon... to school, to any

> school function, or onto any school-sponsored transportation.
>
> (b) Making a threat or false report...

FLA. STAT. § 230.235 (2000). *See also* BURNS IND. CODE ANN. § 5-2-10.1-6 (2001) ("[a school] safety plan... must include provisions for zero (0) tolerance for alcohol, tobacco, drugs, and weapons on school property"); HAW. REV. STATS. § 302A-1134.6(a) (2000) ("Zero tolerance policy": "Any child who possesses, sells, or uses a dangerous weapon... may be excluded from attending"); N.J. Stat. § 18A:37-7 (2001) ("Zero Tolerance for Guns Act"); OHIO REV. CODE ANN. § 3313.534 (Anderson 2001) ("the board of education of each city, exempted school district and local school district shall adopt a policy of zero tolerance for violent, disruptive, or inappropriate behavior...."). Petitioners submit, however, that it is fairly axiomatic that a desire to retain federal funding is not a proper basis for a deprivation of a constitutionally cognizable property right.

Petitioners' "hard case" proves with crystal clarity why the policy challenged in this lawsuit is fundamentally flawed as violative of due process and equal protection. A student acknowledged to "at no time ... pose a threat to harm anyone" took actions admitted by school officials to have been in a classmate's "best interests" that may have saved her life,[4] then received for it a semester expulsion

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[4] Actions that were, in fact, consistent with the legislative intent of both the Virginia student disciplinary statute and the Loudoun County Public School disciplinary policy, which is to preserve school safety and order. Petitioner Ratner's actions may have saved a student's life and taken a dangerous implement out of the hands of students who could have used it to injure. *See* VA. CODE ANN. § 22.1-279.6

(with school authorities apparently satisfied they were as lenient as the policy permitted because they did not expel Ben Ratner for the full year).[5] If semester expulsion and a permanent record of a "weapons possession" are imposed on a student who intervened to save a life, and whose conduct was called "honorable" and "noble" by school officials, what becomes of ordinary students who run afoul of such policies? If Respondents' conduct and the policy that animated it cannot be characterized as "arbitrary," "unreasonable," "irrational," or failing to advance a legitimate pedagogical interest in school discipline, the Fourth Circuit's decision merits no review. But if, as Petitioners submit, virtually nothing is more arbitrary, irrational and unreasonable than blind adherence to a policy that requires a heroic, caring thirteen-year-old to be subjected to the brutal

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(school board policies shall "incorporate student discipline options and alternatives to preserve a safe nondisruptive environment....") LCPS Policy, App. G2 ("These policies and rules are designed to protect the essential rights of students while ensuring an orderly, safe school environment."). These purposes are evident in an exemption from school weapons policies provided by Virginia for students possessing weapons that are "part of [the] school's curriculum and us[ed] for that purpose," or for "a knife or blade which [a student] uses customarily in his trade." VA. CODE ANN. § 18.2-308.1. Where a student is suspended pursuant to a "Zero Tolerance" policy for behavior that *advances* legislative and pedagogical purposes, there is no clearer instance of conduct that is characterizable as "irrational" and "arbitrary."

[5] The Fourth Circuit suggested that Respondents' policy may not be properly characterizable as a "Zero Tolerance" policy because the suspension was for less than a year. App. B4, n. 2. Petitioners recognize that the phrase carries no constitutional significance, but submit that a decision to impose a full semester expulsion for Ben Ratner's "noble" and "honorable" conduct is certainly some form of intolerance.

ostracization of a half-year suspension, then the Petition should be granted to address whether there exist constitutional limits to one-size-fits-all "Zero Tolerance" policies. As the Sixth Circuit cautioned in *Seal*, "Consistency is not a substitute for rationality." 229 F.3d at 581.

CONCLUSION

For the reasons set forth above, Petitioners respectfully request that their petition be granted, and that certiorari issue to the United States Court of Appeals for the Fourth Circuit to review the appeals court's decision affirming the dismissal of their lawsuit against Respondents.

Respectfully submitted,

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November 26, 2001

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BENJAMIN A. RATNER, a minor, by and through his mother and next friend, Beth Haney; BETH HANEY, individually,	)	
- Plaintiffs - Appellants,	)	
v.	)	
LOUDOUN COUNTY PUBLIC SCHOOLS; EDGAR B. HATRICK, individually and in his official capacity as Division Superintendent, Loudoun County Public Schools; HARRY E. BIBB, individually and in his official capacity as Superintendent's Designee, Loudoun County Public Schools; JOSEPH L. MAUCK, individually and in his official capacity as Principal, Blue Ridge Middle School; ROBERTA GRIFFITH, individually and in her official capacity as Assistant Principal, Blue Ridge Middle School,	)	No. 00-2157 CA-00-944-A
Defendants - Appellees.	)	

On Petition for Rehearing and Rehearing En Banc

The Appellants' petition for rehearing and rehearing en banc was

submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and as the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

For the Court,

/s/

Patricia S. Connor
CLERK

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BENJAMIN A. RATNER, a minor, by and through his mother and next friend, Beth Haney; BETH HANEY, individually,	)	
Plaintiffs-Appellants,	)	No. 00-2157
v.	)	
LOUDOUN COUNTY PUBLIC SCHOOLS; EDGAR B. HATRICK, individually and in his official capacity as Division Superintendent, Loudoun County Public Schools; HARRY E. BIBB, individually and in his official capacity as Superintendent's Designee, Loudoun County Public Schools; JOSEPH L. MAUCK, individually and in his official capacity as Principal, Blue Ridge Middle School; ROBERTA GRIFFITH, individually and in her official capacity as Assistant Principal, Blue Ridge Middle School,	)	Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Albert V. Bryan, Jr., Senior District Judge.
Defendants-Appellees.	)	(CA-00-944-A)

Argued: May 8, 2001
Decided: July 30, 2001

Before WIDENER and MOTZ, Circuit Judges, and HAMILTON, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion. Judge Hamilton wrote a concurring opinion.

COUNSEL

ARGUED: Steven Henry Aden, THE RUTHERFORD INSTITUTE, Charlottesville, Virginia, for Appellants. John Otto Easton, JORDAN, COYNE & SAVITS, L.L.P., Fairfax, Virginia, for Appellees. ON BRIEF: Carol T. Stone, Anna M. Stafford, JORDAN, COYNE & SAVITS, L.L.P., Fairfax, Virginia, for Appellees.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

In October 1999, Benjamin Ratner, age 13, was in the eighth grade at Blue Ridge Middle School in Loudoun County, Virginia.1 On October 8, 1999, a schoolmate told Ratner that she had been suicidal the previous evening and had contemplated killing herself

by slitting her wrists. She also told Ratner that she inadvertently had brought a knife to school in her binder that morning. Ratner had known her for two years, was aware of her previous suicide attempts, and feared for her safety. Thus, he took the binder from her and put it in his locker. He did not tell school authorities about the knife, but he intended to tell both his and her parents after school.

By lunchtime that day, Roberta Griffith, Assistant Principal at the school, had learned that the girl might have given a knife to Ratner.

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1 Our recitation of the facts of this case are those found in Ratner's complaint, which we accept as true for the purposes of this appeal. *Mayes v. Rapoport*, 198 F.3d 457, 460 (4th Cir. 1999).

Eventually, Fanny Kellogg, Dean at the school, summoned Ratner to her office and asked him about the knife. Ratner admitted that he had it, and at Kellogg's direction he went alone to his locker, retrieved the binder, and gave it to Kellogg. Kellogg acknowledged that she believed Ratner acted in what he saw as the girl's best interest and that at no time did Ratner pose a threat to harm anyone with the knife.

Nonetheless, Ratner was then suspended by Griffith for 10 days for possessing a knife on school grounds in violation of school board policy. Four days later, the school's principal, Joseph Mauck, affirmed Ratner's suspension with written notice. Two days after that, Edgar Hatrick, Division Superintendent for the Loudoun County Public Schools, issued written notice informing Ratner that

he was being suspended indefinitely pending further action by the school board, and informing Ratner that Hatrick was recommending to an administrative hearing panel that Ratner be suspended for the remainder of the school term, which ended February 1, 2000. The administrative hearing panel met on October 29, 1999, and recommended Ratner be suspended for the remainder of the term, and Hatrick then gave Ratner written notice of his long-term suspension. Ratner's mother, Beth Haney, requested and received a hearing before the school district's Discipline Committee to appeal, but that committee unanimously approved Ratner's long-term suspension.

Ratner, through his mother, filed suit against the school district and four of its employees under 42 U.S.C. § 1983. Ratner's complaint asserted that his suspension under what is called a zero tolerance policy (2) amounted to violations of Ratner's Fourteenth Amendment rights to due process and equal protection and

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2 Ratner's complaint asserts that the school employs a zero tolerance policy regarding weapons, a policy that precludes officials from considering the circumstances of a particular case when meting out punishment. Although we accept Ratner's assertion as true for the purposes of this appeal, we note that his brief's recitation of the school's policies indicates that possession of a weapon on school grounds would not necessarily result in long-term suspension. Instead, as recited by Ratner, board policy in such cases apparently begins with a presumption that offending students will be expelled (permanently removed) but allows school officials discretion to subject offending students "to such lesser disciplinary action,

including long-term suspension [suspension for one or two semesters], as may be deemed appropriate."

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his Eighth Amendment right to be free from cruel and unusual punishment, and asserted several other causes of action, and sought compensatory and punitive damages, fees and costs, and other relief.

The district court dismissed Ratner's complaint for failure to state a claim under Fed. R. Civ. P. 12(b)(6). We review de novo a district court's decision to dismiss a case for failure to state a claim. *Mayes v. Rapoport*, 198 F.3d 457, 460 (4th Cir. 1999). In reviewing a 12(b)(6) dismissal, we construe factual allegations in the nonmoving party's favor, treating them as true, and we will affirm a dismissal for failure to state a claim only if it appears that the plaintiffs would not be entitled to relief under any facts which could be proved in support of their claims. *Mayes*, 198 F.3d at 460 (quotations and citations omitted). Having heard oral argument and considering the briefs and the record, we find no reversible error, and we affirm substantially for the same reasons expressed by the district court in its opinion, *Ratner v. Loudoun County Pub. Sch.*, Civ. No. 00-944-A (E.D. Va. July 28, 2000).

In its memorandum opinion, the district court concluded Ratner's claim was, in essence, a claim of due process violations. The district court also concluded, correctly, that the school officials gave Ratner constitutionally sufficient, even if imperfect, process in the various notices and hearings it accorded him, and we agree. *See Goss v. Lopez*, 419 U.S. 565, 581 (1975) (describing process due students in connection with suspensions from school).

However harsh the result in this case, the federal courts are not properly called upon to judge the wisdom of a zero tolerance policy of the sort alleged to be in place at Blue Ridge Middle School or of its application to Ratner. Instead, our inquiry here is limited to whether Ratner's complaint alleges sufficient facts which if proved would show that the implementation of the school's policy in this case failed to comport with the United States Constitution. We conclude that the facts alleged in this case do not so demonstrate.

The judgment of the district court is accordingly

AFFIRMED.

HAMILTON, Senior Circuit Judge, concurring:

On appeal, Ratner challenges the district court's dismissal of three federal constitutional claims alleged in his complaint: (1) a procedural due process claim under the Fourteenth Amendment; (2) an equal protection claim under the Fourteenth Amendment; and (3) a cruel and unusual punishment claim under the Eighth Amendment. U.S. Const. amend. VIII, XIV, § 1. After accepting all well-pleaded allegations in Ratner's complaint as true and drawing all reasonable factual inferences from those facts in his favor, it appears certain that he cannot prove any set of facts which would entitle him to relief on any of the three claims asserted. Accordingly, the opinion for the court correctly affirms the district court's Rule 12(b)(6) dismissal of Ratner's claims, and I am constrained to concur in that opinion. *Edwards v. City of Goldsboro*, 178 F.3d 231, 244 (4th Cir. 1999) ("[A] Rule 12(b)(6) motion should only be granted if, after accepting all well-pleaded allegations in the plaintiff's complaint as true and drawing all reasonable factual inferences from those facts in the

plaintiff's favor, it appears certain that the plaintiff cannot prove any set of facts in support of his claim entitling him to relief.").

I write separately to express my compassion for Ratner, his family, and common sense. Each is the victim of good intentions run amuck. Ratner's complaint alleges that school suspensions for possession of a weapon on Loudoun County school property are imposed automatically, pursuant to a zero-tolerance policy that precludes consideration of the facts and circumstances of a particular student's conduct in determining a violation of stated policy and the resulting student punishment. There is no doubt that this zero-tolerance/automatic suspension policy, and others like it adopted by school officials throughout our nation, were adopted in large response to the tragic school shootings that have plagued our nation's schools over the past several years. Also, no doubt exists that in adopting these zero-tolerance/automatic suspension policies, school officials had the noble intention of protecting the health and safety of our nation's school children and those adults charged with the profound responsibility of educating them. However, as the oft repeated old English maxim recognizes, "the road to hell is paved with good intentions." The panic over school violence and the intent to stop it has caused school officials to jettison the common sense idea that a person's punishment should fit his crime in favor of a single harsh punishment, namely, mandatory school suspension. Such a policy has stripped away judgment and discretion on the part of those administering it; refuting the well established precept that judgment is the better part of wisdom. Here, a young man, Ratner, took a binder containing a knife from a suicidal fellow student in an effort to save her life. He put the binder in his locker without even opening it. Indeed, at all times, Ratner never saw the knife. Further, the facts do not offer even the hint of a suggestion that Ratner ever intended to personally possess the knife or harm

anyone with it. In fact, the first school official on the scene reported that at no time did Ratner intend to harm anyone with the knife. Yet, based on the school's zero-tolerance/automatic suspension policy, Ratner was suspended from school for nearly four months.

School officials should, without doubt, punish a student for knowingly and intentionally bringing a dangerous weapon on school property. But the question raised by the facts of Ratner's case is one of degree and the law must be flexible enough so that school officials may intrude upon the right to a free appropriate public education only in the most justifiable circumstances. *See Goss v. Lopez*, 419 U.S. 565, 573-74 (1975) (holding that property interest in public education is created when state maintains a public school system and requires children to attend). Under a facts/circumstances-sensitive examination of this case, Ratner's nearly four-month suspension from middle school is not justifiable. Indeed, it is a calculated overkill when the punishment is considered in light of Ratner's good-faith intentions and his, at best, if at all, technical violation of the school's policy.

Suffice it to say that the degree of Ratner's violation of school policy does not correlate with the degree of his punishment. Certainly, the oft repeated maxim, "there is no justice without mercy" has been defiled by the results obtained here. But alas, as the opinion for the court explains, this is not a federal constitutional problem.

C1

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BENJAMIN A. RATNER, a minor, by and through his mother and next friend, Beth Haney; BETH HANEY, individually, Plaintiffs - Appellants, v. LOUDOUN COUNTY PUBLIC SCHOOLS; EDGAR B. HATRICK, individually and in his official capacity asDivision Superintendent, Loudoun County Public Schools; HARRY E. BIBB, individually and in his official capacity as Superintendent's Designee, Loudoun County Public Schools; JOSEPH L. MAUCK, individually and in his official capacity as Principal, Blue Ridge Middle School; ROBERTA GRIFFITH, individually and in her official capacity as Assistant Principal, Blue Ridge Middle School, Defendants - Appellees.	)	No. 00-2157 CA-00-944-A

C2

Appeal from the United States District Court for the
Eastern District of Virginia at Alexandria

In Accordance with the written opinion of this Court filed this day, the Court affirms the judgment of the District Court.

/s/
Patricia S. Connor
CLERK

D1

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

BENJAMIN A. RATNER, a minor, by and through his mother and next friend, BETH HANEY, and BETH HANEY individually,	)
Plaintiffs,	)
v.	)
LOUDOUN COUNTY PUBLIC SCHOOLS, *et al.*	)
Defendants.	)

ORDER

This matter is before the court on defendants' motion to dismiss. Upon consideration of the parties' submissions and for the reasons stated in the Memorandum Opinion filed this day, it is hereby

ORDERED that:

1. Defendants' motion to dismiss is GRANTED; and

2. This case is dismissed with prejudice.

/s/
Albert V. Bryan, Jr.
United States District Judge

Alexandria, Virginia
July 28th, 2000

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

BENJAMIN A. RATNER, a minor, by and through his mother and next friend, BETH HANEY, and BETH HANEY individually,	)	
Plaintiffs,	)	
v.	)	CIVIL ACTION NO. 00-944-A
LOUDOUN COUNTY PUBLIC SCHOOLS, *et al.*,	)	
Defendants.	)	

Memorandum Opinion

Plaintiffs filed their complaint in this matter on June 8, 2000, asserting eight counts against defendant Loudoun County Public Schools and four of its employees, who were sued in both their individual and official capacities. In essence, plaintiffs allege that defendants are liable to them for harm that plaintiff Ratner suffered as a result of his suspension from Blue Ridge Middle School between October 8, 1999, and February 1, 2000. Plaintiffs contend that due to the suspension and the manner in which defendants decided upon imposing the suspension, plaintiff Ratner's Fourteenth Amendment rights of due process and equal protection and his Eighth Amendment right of freedom from cruel and unusual punishment were violated, and they seek compensation under 42

U.S.C. § 1983. Plaintiffs also contend that defendants' actions constitute unlawful conspiracies under Virginia law and under 42 U.S.C. § 1985, and violations of the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq*.

In addition to compensatory damages, plaintiffs seek attorneys' fees and costs pursuant to 42 U.S.C. § 1988, and punitive damages. Plaintiffs also request that the court declare that certain provisions of the Virginia Code and the official or *de facto* policy of defendant Loudoun County Public Schools are insufficient to protect the students' right to public education under the Fourteenth Amendment and enjoin the administration or enforcement of such a policy. In addition, plaintiffs request that the court declare that the actions of defendants, in depriving plaintiff Ratner of his right to a free public education and in imposing unduly harsh and unwarranted penalties on him "pursuant to its 'zero tolerance policy,'" were in violation of the Eighth and Fourteenth Amendments to the Constitution.

Defendants have moved to dismiss these counts on a number of grounds, including failure to state a claim upon which relief can be granted under Fed. R. Civ. P. 12(b)(6), the eleventh amendment's ban on suits against state entities, and qualified immunity. Defendants have also argued that the case should be dismissed due to plaintiffs' failure to exhaust administrative remedies under the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq*.. Upon consideration of the parties' submissions and for the reasons stated below, the court concludes that Plaintiffs have failed to state an actionable claim for relief and the entire case must be dismissed on these grounds.

Factual Background

The factual background allegations in plaintiffs' complaint are as follows: on October 8, 1999, plaintiff Ratner was an eighth grade student at Blue Ridge Middle School in Loudoun County, Virginia. On that day, he was informed by his friend Jillian Carlson, who had a history of suicide attempts and psychiatric treatment, that she had contemplated suicide the previous night and inadvertently brought a knife to school in her binder. Plaintiff Ratner took the binder from her and put it in his own locker.

Upon defendant Griffith's, the assistant principal's, learning that Carlson may have brought a knife to school and given it to plaintiff Ratner, Carlson was questioned and searched. Plaintiff Ratner was then called from class by a dean of the school, Ms. Kellogg, who asked him if he had the knife. Plaintiffs allege that he immediately brought the binder with the knife in it to Ms. Kellogg, and "Ms. Kellogg reported that she believed that Mr. Ratner acted in what he perceived to be Ms. Carlson's best interests. Ms. Kellogg further reported that at no time did Mr. Ratner intend to harm anyone with the knife."

On that same day, October 8, 1999, defendant Griffith issued a notice of suspension to plaintiff Ratner for a period of ten days for violating School Board Policy Section 8-32 regarding the possession of weapons on school property. On October 12, 1999, defendant Mauck, principal of Blue Ridge Middle School affirmed the decision and issued a notice of the ten day suspension. On October 14, 1999, Defendant Hatrick, Division Superintendent for Loudoun County Public Schools, ordered plaintiff Ratner to be suspended indefinitely pending a decision by the School Board. Plaintiffs allege that defendant Hatrick informed plaintiffs Ratner and

Haney of his intent to recommend that the suspension last through the remainder of the Fall 1999 semester, which ran through February 1, 2000. On October 28, 1999, an administrative hearing panel convened and subsequently recommended that plaintiff Ratner be suspended for the balance of the Fall 1999 semester. Defendant Hatrick adopted the recommendation of the hearing panel and issued a written notice of the long-term suspension on October 29, 1999.

Through plaintiff Haney, plaintiff Ratner requested a hearing before the Discipline Committee to appeal the suspension. The committee convened on December 7, 1999, and unanimously approved the imposed suspension.

Discussion

Upon consideration of these factual allegations, it appears clear to the court that the crux of plaintiffs' complaint is in count one, which raises claims of due process violations. In this count, plaintiff claims that the notices of suspension issued on October 8th, 12th, and 14th, and December 10th violated Virginia Code Section 22.1-277 in numerous ways. In particular, one or more of these notices allegedly (1) failed to timely notify defendant Hatrick or Bibb of the facts of plaintiff Ratner's suspension on October 8, 1999; (2) failed to include information regarding the availability of community-based educational programs, alternative education programs or to other educational options; (3) wrongfully indicated that plaintiff Ratner could request a hearing before the Administrative Hearing Panel in order to contest the suspensions rather than before the school board or a committee of the school board; and (4) failed to advise plaintiff Ratner of his right to seek review in state court. Plaintiff Ratner also alleges that representatives of defendant Loudoun

County Public Schools encouraged him to forego representation at the initial states of review of the suspension, and complains about the delay between the initial notice of suspension issued October 8, 1999, and the final notice issued December 10, 1999.

Furthermore, plaintiffs contend that the suspensions constituted grossly excessive punishment that bore no rational relationship to and without due consideration of the circumstances. Plaintiffs assert that the state procedures are inadequate to protect the students' due process rights because the students are not informed of right to counsel or judicial review and because suspensions are imposed pursuant to a "zero tolerance" policy that precludes consideration of the facts and circumstances of the particular student's conduct.

Defendant asserts that the above allegations fail to make out a claim for the violation of plaintiff Ratner's due process rights, and the court agrees. When faced with a short-term suspension from public school, *i.e.*, a ten day suspension or less, a student's due process right under the constitution, *see Goss v. Lopez*, 419 U.S. 565, 581 (1975), and under Virginia law, *see* Va. Code §22.277 guarantee him oral or written notice of the charges against him, an explanation of the evidence the authorities have, and a reasonably prompt opportunity to present his side of the story. As alleged, the facts in plaintiff's complaint do not show that these guarantees were violated. Indeed, on October 8th, plaintiff Ratner had an opportunity to present his side of the story on hearing the charges against him to Dean Kellogg, an authority at the school, and took that opportunity, which is clear from the plaintiffs' allegation that Dean Kellogg reported her belief that he acted in the best interest of his friend. Although ultimately Ms. Kellogg's recommendation was not accepted by the decision maker and the suspension was imposed, this fact does not bear on whether plaintiff Ratner was

given the process due him by school officials.

Moreover, while it is alleged that some technical omissions occurred in the various notices, by October 28, 1999, before the imposition of the semester-long suspension, the student was given an opportunity to present his side of the story to a body empowered to ameliorate the sanction. Furthermore, as set out in plaintiff's allegations and memorandum in opposition to defendant's motion to dismiss, plaintiff was given a second hearing on appeal on December 7, 1999. Apparently, these decision making bodies, to whom plaintiff Ratner was able to present his side of the story, did not accept his version, or at least did not accept his version to such an extent as would persuade them to repeal the suspension. Under these circumstances, plaintiff Ratner had received all the process which was due him. Furthermore, the absence of counsel, even if as plaintiff alleges the need for professional representation was discouraged, does not amount to a due process violation.

Furthermore, the court cannot find any unconstitutionality in the Virginia statues at issue, and plaintiffs' claims that Virginia's ban on the possession of weapons in schools is unconstitutionally vague and over broad is unavailing. While such claims of over breadth could conceivably carry the day if it were possible to construe the weapon involved as something other than a weapon, uncertainty about whether the object involved here, namely a knife, was subject to the weapons' ban is unreasonable. As applied to this case, therefore, plaintiffs' efforts to challenge the law on notice grounds is unpersuasive.

With the lack of a due process violation, the court finds that the complaint must be dismissed, for no actionable equal protection or eighth amendment cruel and unusual punishment claims are present

on these allegations. Furthermore, absent a constitutional violation, the conspiracy claims, under both common law and §1985 must fall, and questions of qualified immunity and the eleventh amendment need not be addressed.

Finally, the court concludes that plaintiff's allegations surrounding the alleged violation of the Individuals with Disabilities Education Act does not save the complaint. Though plaintiffs do not advance a direct claim under this act in their responding memorandum - a claim that these allegations could not sustain - plaintiffs do argue that its violation constitutes a claim under 42 U.S.C. § 1983. This claim, however, has been explicitly rejected in *Sellers v. School Board of Manassas*, 141 F.3d 524 (4th Cir. 1998).

Conclusion

For the reasons stated above, plaintiffs have failed to make out a claim upon which relief could be granted, and this case is dismissed with prejudice.

/s/
Albert V. Bryan, Jr.
United States District Judge

Alexandria, Virginia
July 28th, 2000

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

BENJAMIN A. RATNER, a minor, by and through his mother and next friend, Beth Haney; BETH HANEY, individually,	)	COMPLAINT
Plaintiffs,	)	
vs.	)	
LOUDOUN COUNTY PUBLIC SCHOOLS; EDGAR B. HATRICK, individually and in his official capacity as Division Superintendent, Loudoun County Public Schools; HARRY E. BIBB, individually and in his official capacity as Superintendent's Designee, Loudoun County Public Schools; JOSEPH L. MAUCK, individually and in his official capacity as Principal, Blue Ridge Middle School; and ROBERTA GRIFFITH, individually and in her official capacity as Assistant Principal, Blue Ridge Middle School,	)	
Defendants.	)	

COMPLAINT

1. This Action arises under federal law and the United States Constitution, and in particular under 42 U.S.C. §§ 1983, 1985 and

1988, and the Individuals With Disabilities in Education Act, 20 U.S.C. § 1415, as well as the Eighth and Fourteenth Amendments to the United States Constitution.

2. This Court has jurisdiction of this case under the provisions of 28 U.S.C. § 1343 in that it arises under 42 U.S.C. §§ 1983, 1985 and 1988, and 20 U.S.C. §1415.

3. Plaintiff BENJAMIN A. RATNER (herein "Mr. RATNER"), a minor child born on January 21, 1986, is a resident of the County of Loudoun, Commonwealth of Virginia. Plaintiff Beth Haney is a resident of the County of Loudoun, Commonwealth of Virginia, and brings this action as the mother, next friend, and legal guardian of minor Plaintiff Mr. RATNER, and on behalf of herself.

4. Defendant LOUDOUN COUNTY PUBLIC SCHOOLS ("LCPS") is an entity organized under the laws, statutes, ordinances and regulations of the Commonwealth of Virginia and the County of Loudoun.

5. Defendant EDGAR B. HATRICK ("HATRICK"), an individual, is, and at all times stated herein, was the Division Superintendent for Secondary Education for LCPS. Upon information and belief, HATRICK was at all times material hereto a resident of the County of Loudoun, Commonwealth of Virginia. HATRICK is sued in both his official and individual capacities. All of the actions of HATRICK set forth in this Complaint were done in his official capacity as Division Superintendent for Secondary Education for LCPS.

6. Defendant HARRY E. BIBB ("BIBB"), an individual, is and at all times stated herein, was the Superintendent's Designee for

LCPS. Upon information and belief, BIBB was at all times material hereto a resident of the County of Loudoun, Commonwealth of Virginia. BIBB is sued in both his official and individual capacities. All of the actions of BIBB set forth in this Complaint were done in his official capacity as the Superintendent's Designee for LCPS.

7. Defendant JOSEPH L. MAUCK ("MAUCK"), an individual, is, and at all times stated herein, was the Principal of Blue Ridge Middle School ("BRMS"), a school operated by LCPS. Upon information and belief, MAUCK was at all times material hereto a resident of the County of Loudoun, Commonwealth of Virginia. MAUCK is sued in both his official and individual capacities. All of the actions of MAUCK set forth in this Complaint were done in his official capacity as the Principal of BRMS.

8. Defendant ROBERTA GRIFFITH ("GRIFFITH"), an individual, is, and at all times stated herein, was the Assistant Principal of Blue Ridge Middle School, a school operated by LCPS. Upon information and belief, GRIFFITH, was at all times material hereto a resident of the County of Loudoun, Commonwealth of Virginia. GRIFFITH is sued in both his official and individual capacities. All of the actions of GRIFFITH set forth in this Complaint were done in her official capacity as Assistant Principal of BRMS.

9. All of the acts of the Defendants set forth in this Complaint were done under the color of state law and occurred in the Commonwealth of Virginia and the County of Loudoun.

GENERAL ALLEGATIONS

10. In October, 1999, Mr. RATNER was duly enrolled as an

eighth-grade student at Blue Ridge Middle School.

11. In October, 1999, Jillian Carlson, a minor, was also enrolled as an eighth-grade student at BRMS. Mr. RATNER had known Ms. Carlson since 1997, when they were both in the sixth grade.

12. Ms. Carlson had a history of suicide attempts which was known to Mr. RATNER. Ms. Carlson did not attend seventh grade at BRMS because of her hospitalization at Dominion Psychiatric Hospital. Through October 1999, Mr. RATNER had discussed Ms. Carlson's mental problems and suicide attempts with her, school officials, Ms. Haney and Ms. Carlson's parents. On October 8, 1999, Ms. Carlson brought a knife to BRMS. Before the first class period, Ms. Carlson gave a note to Mr. RATNER that stated Ms. Carlson had considered committing suicide the night before by slitting her wrists, but that she did not do so because she was interrupted by a telephone call from Mr. RATNER. The note further stated that she had inadvertently brought the knife with her to school, and that it was in her notebook binder.

13. Out of concern for Ms. Carlson and the threat to her safety posed by the knife, Mr. RATNER took the binder containing the knife from Ms. Carlson. Mr. RATNER locked the binder with the knife in his locker. Mr. RATNER did not at any time open the binder or examine the knife, and he was unaware at all times of its physical appearance or dimensions.

14. At lunchtime that same day, two students notified defendant Assistant Principal Roberta GRIFFITH that Ms. Carlson had brought a knife to school and may have given it to Mr. RATNER. Ms. GRIFFITH questioned Ms. Carlson about the knife. Ms. Carlson denied possessing the knife. Ms. GRIFFITH searched

Ms. Carlson's personal effects and her locker without locating the knife.

15. Fanny Kellogg, a Dean at BRMS, summoned Mr. RATNER, from his class. When asked if he had a knife, Mr. RATNER immediately went to his locker and brought Ms. Carlson's binder to Ms. Kellogg. Ms. Kellogg reported that she believed that Mr. RATNER acted in what he perceived to be Ms. Carlson's best interests. Ms. Kellogg further reported that at no time did Mr. RATNER intend to harm anyone with the knife.

16. That same day, October 8, 1999, Defendant Assistant Principal GRIFFITH issued a notice of suspension suspending Mr. RATNER for a 10-day period for allegedly violating School Board Policy Section 8-32 regarding weapons possession on school property (hereafter, "the October 8 Notice").

17. On October 12, 1999, Defendant Joseph L. MAUCK, acting in his capacity as Principal of BRMS, affirmed the decision to suspend Mr. RATNER for 10 days. Principal MAUCK issued a notice of the ten day suspension on October 12, 1999 (hereafter, "the October 12th Notice").

18. On October 14, 1999, Defendant Edgar B. HATRICK, Division Superintendent for LCPS, ordered that Mr. RATNER be suspended indefinitely pending a decision by the School Board of the indefinite suspension on October 14, 1999, (hereafter, "the October 14th Notice"). Dr. HATRICK informed Mr. RATNER and Ms. Haney of his intent to recommend that Mr. RATNER be suspended for the remainder of the Fall 1999 semester, which ran through February 1, 2000.

18. On October 28, 1999, an Administrative Hearing Panel was convened to consider Dr. HATRICK's proposed recommendation. The Administrative Hearing Panel recommended that Mr. RATNER be suspended for the balance of the Fall 1999 semester.

19. On October 29, 1999, Dr. HATRICK adopted the recommendation of the Administrative Hearing Panel and suspended Mr. RATNER from attending any public school operated by LCPS for the remainder of the Fall 1999 semester. Written notice of the long-term suspension was issued by Dr. HATRICK on October 29, 1999 (hereafter, "the October 29 Notice").

20. On November 2, 1999, Mr. RATNER, through his mother, Ms. Haney, requested a hearing before the Discipline Committee of Defendant LCPS to appeal the imposed suspension.

21. On December 7, 1999, the Discipline Committee convened to consider Mr. RATNER's appeal. The Discipline Committee unanimously approved the imposed suspension. Dr. HATRICK formally notified Mr. RATNER of the Discipline Committee's decision by letter dated December 10, 1999 (hereafter, "the December 10 Notice").

22. Mr. RATNER remained barred from all LCPS properties and activities from October 8, 1999, until February 1, 2000.

FIRST CAUSE OF ACTION

Violation of Constitutional Right of Due Process

23. Plaintiff realleges and incorporates herein the allegations contained in paragraphs 1 through 22 above.

24. Virginia Code Section 22.1-3 provides Mr. RATNER an entitlement to a free education in a public school. This entitlement is a property interest protected by the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

25. By suspending Mr. RATNER without complying with the provisions of Virginia Code Section 22.1-2777, the Defendants deprived Mr. RATNER of his Constitutional right of procedural due process, as hereinafter alleged.

26. Virginia Code Section 22.1-277 states that "upon suspension of any pupil the [school official] responsible for such suspension shall report the facts of the case in writing to the division superintendent or his designee and the parent of the pupil suspended. The division superintendent or his designee shall review forthwith the actions taken by the [school official] upon petition for such a review by any party . . . The decision of the division superintendent or his designee may be appealed to the school board or a committed thereof in accordance with the regulations of the school board . . ." (emphasis added.)

27. The October 8th Notice of Suspension issued by Assistant Principal GRIFFITH was copied to Terence Hill, Director of Secondary Education and to Principal MAUCK. Neither the Division Superintendent, Dr. HATRICK, or his designee, Mr. BIBB, were notified of the facts upon Mr. RATNER's suspension on October 8, 1999.

28. The failure to promptly notify the Division Superintendent or his designee of the suspension violated Virginia Code Section 22.1-277.

29. The failure to promptly notify the Division Superintendent or his designee denied Mr. RATNER a prompt review of the October 8th suspension by those officials and the school board.

30. Virginia Code Section 22.1-277.03.A directs that the written or oral notice of a suspension of ten days or less include "information regarding the availability of community-based educational programs, alternative education programs or other educational options..." Further, Code Section 22.1-277.03.A provides that "when such notice [of suspension] is given orally, the omission of any required information will not automatically be grounds for the reversal of the suspension." (emphasis added.)

31. The October 8th Notice did not include information regarding the availability of community-based educational programs, alternative education programs or other educational options as required by Code Section 22.1-277.03.A.

32. The October 12th Notice did not include information regarding the availability of community-based educational programs, alternative education programs or other educational options as required by Code Section 22.1-277.03.A.

33. The October 14th Notice imposed a suspension for "an indefinite period of time..." Virginia Code Section 22.1-277.03.B provides that the "decision of the division superintendent or his designee [to suspend a student for more than ten days] may be appealed to the school board or a committee thereof, in accordance with regulations of the school board..."

34. The October 14th Notice did not include information regarding Mr. RATNER's right to seek review of the indefinite suspension

before the school board or a committee thereof.

35. The October 14th Notice directed Mr. RATNER to request a hearing before the Administrative Hearing Panel in order to contest the indefinite suspension and Dr. HATRICK's proposed recommendation for a long-term suspension.

36. The Administrative Hearing Panel is not a committee of the school board.

37. Virginia Code Section 22.1-277.03.B directs that "In the case of a suspension for more than ten days, such written notice [of the suspension] shall provide information regarding the availability of community-based educational programs, alternative education programs or other educational options..."

38. The October 14th Notice did not include information regarding the availability of community-based educational programs, alternative education programs or other educational options as required by Code Section 22.1-277.03.B.

39. The December 10th Notice did not include information regarding the availability of community-based educational programs, alternative education programs or other educational options as required by Code Section 22.1-277.03.B.

40. The December 10th Notice did not advise Mr. RATNER of his right to seek review in state Circuit Court.

41. The aforementioned defects in the October 8th Notice, the October 12th Notice, the October 14th Notice and the December 10th Notice denied Mr. RATNER his constitutional right of due

process.

42. Representatives of LCPS encouraged Mr. RATNER to forego representation by counsel at the initial stages of review of the suspension, in violation of Mr. RATNER's right of due process.

43. The delay of over two months from the initial notice of suspension on October 8, 1999 to the issuance of the final notice of suspension on December 10, 1999, during which time Mr. RATNER was not permitted to attend school, denied Mr. RATNER a prompt review of his suspension, in violation of his right to due process.

44. Each of the suspensions constituted grossly excessive punishment that bore no rational relationship to, and was imposed without due consideration of the circumstances surrounding the alleged misconduct, and thus were arbitrary and capricious and imposed in violation of Mr. RATNER's right to due process.

45. The procedure established by state law for review of disciplinary suspensions from public schools are inadequate to protect students' rights of due process because such do not provide for a prompt review of the suspension, the amount of time necessary to implement the review process is unreasonably long, and state law does not require a stay of a suspension pending review by the school board or its agents.

46. State procedures are inadequate to protect students' rights of due process because the student is not informed of his right to counsel, nor informed of his right to judicial review.

47. State procedures are inadequate to protect students' rights of

due process because suspensions are imposed pursuant to a "zero tolerance" policy that precludes consideration of the facts and circumstances of the particular student's conduct.

48. As a direct and proximate result of the wrongful conduct of the Defendants, all of which occurred under the color of state law, Mr. RATNER was deprived of his property right to a free, public education without due process of law, causing him to be impeded in his educational progress, to suffer injury to his reputation and mental well-being, to be ridiculed by the teachers and staff of LCPS, to be separated from his peers, and to incur unwarranted out-of-pocket expenses in meeting Mr. RATNER's educational needs.

SECOND CAUSE OF ACTION

Violation of the Right to Equal Protection of the Law

49. Plaintiff realleges and incorporates herein the allegations contained in paragraphs 1 through 48, above.

50. Other students in the LCPS system who were similarly situated to Plaintiff by virtue of having been engaged in similar violations of the weapons policy were not subject to the same or similar punishment imposed upon Mr. RATNER,. Consequently, the suspensions imposed upon Mr. RATNER deprived him of his constitutional right to equal protection of the law.

51. State law is inadequate to protect students' rights to equal protection of the law because it does not prove a mechanism for sanctioning similarly situated students in the same manner.

THIRD CAUSE OF ACTION
Violation of Eighth Amendment Ban on
Cruel and Unusual Punishment

52. Plaintiff realleges and incorporates herein the allegations contained in paragraphs 1 through 52 above.

53. Each of the suspensions constituted grossly excessive punishment that bore no rational relationship to, and was imposed without due consideration of the circumstances surrounding the alleged misconduct, and thus constituted excessive punishments in violation of the Eighth Amendment to the United States Constitution.

FOURTH CAUSE OF ACTION
Conspiracy to Violate Civil and Constitutional Rights

54. Plaintiff realleges and incorporates herein the allegations contained in paragraphs 1 through 53 above.

55. Beginning on October 8, 1999, and continuing through February 1, 2000, the Defendants, and each of them, conspired and agreed to interfere with Mr. RATNER's property interest in a free, public education, and to deny him his constitutional rights of due process, equal protection and freedom from cruel and unusual punishment. In furtherance of this conspiracy, it was agreed by the Defendants to deny Mr. RATNER, by whatever means necessary, the free, public education to which he is entitled.

56. In doing the acts alleged in this complaint, each of the Defendants acted as the agent for and on behalf of the other Defendants, and was acting at all times within the course and scope

of their respective agencies and in furtherance of the above-described conspiracy.

57. In doing the acts alleged in this Complaint, each of the Defendants were, jointly and severally, policy makers for LCPS.

58. As a result of this conspiracy, Mr. RATNER was deprived of a free, public education and impeded in his educational programs and forced to incur unwarranted out-of-pocket expenses in meeting Mr. RATNER's educational needs. Mr. RATNER also suffered injury to his reputation and mental well-being, ridicule by the teachers and staff of LCPS, separation from his peers, and emotional and mental anguish.

FIFTH CAUSE OF ACTION

Conspiracy to Violate Civil and Constitutional Rights
in Violation of 42 U.S.C. § 1985

59. Plaintiff realleges and incorporates herein the allegations continued in paragraphs 1 through 58 above.

60. Beginning On October 8, 1999, and continuing through February 1, 2000, the Defendants, and each of them, conspired and agreed to interfere with Mr. RATNER's property interest in a free, public education, and to deny him his constitutional rights of due process, equal protection and freedom from cruel and unusual punishment. In furtherance of this conspiracy, it was agreed by the Defendants to deny Mr. RATNER, by whatever means necessary, the free, public education to which he is entitled.

61. In doing the acts alleged in this complaint, each of the Defendants acted as the agent for and on behalf of the other

Defendants, and was acting at all times within the course and scope of their respective agencies and in furtherance of the above-described conspiracy.

62. In doing the acts alleged in this Complaint, each of the Defendants were, jointly and severally, policy makers for LCPS

63. The acts of the Defendants, jointly and severally, as alleged herein above constituted a conspiracy to deprive Plaintiff of fundamental constitutional rights in violation of 42 U.S.C. § 1985, entitling Plaintiff to recover damages, reasonable attorney's fees, expert fees, and costs incurred in the prosecution of this action pursuant to 42 U.S.C. § 1988.

64. As a result of this conspiracy, Mr. RATNER was deprived of a free, public education and impeded in his educational progress and forced to incur unwarranted out-of-picket expenses in meeting Mr. RATNER's educational needs. Mr. RATNER also suffered injury to his reputation and mental well-being, ridicule by the teachers and staff of LCPS, separation from his peers, and emotional and mental anguish.

SIXTH CAUSE OF ACTION

Violation of the Individuals with Disabilities Education Act
20 U.S.C. § 1400 et seq.

65. Plaintiff realleges and incorporates herein the allegations contained in paragraphs 1 through 64 above.

66. Mr. RATNER suffers from Attention Deficit Hyperactive Disorder, a learning disability.

67. The suspensions constituted a change in Mr. RATNER's educational placement.

68. The Defendants failed to comply with the notice and other procedural requirements mandated by the IDEA in effecting the change in Mr. RATNER's placement.

69. As a direct and proximate result of the wrongful conduct of the Defendants, Mr. RATNER was deprived of a free, public education, causing him to be impeded in his educational progress, to suffer injury to his reputation and mental well-being, to be ridiculed by the teachers and staff of LCPS, to be separated from his peers, and to incur unwarranted out-of-pocket expenses in meeting Mr. RATNER's education needs.

SEVENTH CAUSE OF ACTION

Attorney's fees and Costs Pursuant to 42 U.S.C. § 1988

70. Plaintiff realleges and incorporates herein the allegations contained in paragraphs 1 through 69 above.

71. Pursuant to U.S.C. § 1988 Plaintiffs is entitled to attorney's fees, costs, and expert fees in connection with the bringing of claims alleged in this Complaint.

EIGHTH CAUSE OF ACTION

Punitive Damages

72. Plaintiff realleges and incorporates herein the allegations contained in paragraphs 1 through 71 above.

73. Plaintiff is entitled to an award of punitive damages because of

but not limited to the Defendants' willful or wanton conduct, the reprehensibility of their conduct, the likelihood of serious harm the actions caused, and the damages suffered by the Plaintiff.

PRAYER FOR RELIEF

WHEREFORE, the Plaintiff respectfully requests that this Court enter an Order as follows:

(A) Pursuant to the Declaratory Judgment Act, 18 U.S.C. §§ 2201-2202, an Order finding and declaring that the provisions of the Virginia Code as set forth herein above, and the official and/or *de facto* policy of the Defendant LCPS are insufficient to protect the rights of students to a free appropriate public education in the Commonwealth of Virginia in violation of the Fourteenth Amendment to the United States Constitution, and permanently enjoining the administration or enforcement of said policy pursuant to Federal Rule of Civil Procedure 65; and further declaring that the actions of the Defendants, jointly and severally, in depriving Plaintiff of his right to free public education and in imposing unduly harsh and unwarranted penalties on Plaintiff pursuant to its "zero tolerance" policy, were in violation of the Eighth and Fourteenth Amendments to the United States Constitution;

(B) Ordering Defendants, jointly and severally, and in their individual and official capacities, to pay to Plaintiff compensation for general and special damages;

(C) Ordering Defendants, jointly and severally, and in their individual and official capacities to pay to Plaintiff punitive

damages;

(D) Ordering Defendants, joint and severally, and in their individual and official capacities, to pay to Plaintiff reasonable attorney's fees and costs in the prosecution of this action pursuant to 42 U.S.C. § 1988;

(E) Ordering Defendants jointly and severally to expunge from Plaintiff RATNER's educational records any reference to the ten-day or long-term suspension, the circumstances surrounding same, or these proceedings; and to refrain from retaliation against Plaintiffs; and

(F) Such other and further as the Court deems necessary and appropriate.

JURY DEMAND

Plaintiff herewith demands a jury trial as to all issues triable to a jury.

Respectfully submitted,

BENJAMIN A. RATNER
By Counsel

ADDENDUM

Student
Rights and Responsibilities

August, 1999

LOUDOUN COUNTY PUBLIC SCHOOLS
102 NORTH ST., N.W.
LEESBURG, VA 20176

* * * *

Basic Rights and Responsibilities

Residents of Loudoun County who are of school age are entitled to a free education in accordance with the laws of the Commonwealth of Virginia. This right and those granted under the Constitution of the United States and the Commonwealth of Virginia and applicable federal and state laws shall be guaranteed without regard to race, religion, creed, sex, disabling condition, or national origin.

This guarantee of rights includes the right of students to have access to courses of study and student activities without regard to sex under the guidelines for compliance with Title IX of the Education Amendments of 1972.

The rights of individuals must be exercised in a way that does not infringe upon the rights of others or threaten the general welfare of the society. Some restrictions may therefore be lawfully imposed by governments, including school boards, upon the manner in which individual rights may be exercised. The School Board is legally empowered to adopt local regulations for the conduct of students. It is also responsible for the education, welfare, and safety of

students in the schools. Its policies and the rules of individual schools provide a code of student conduct, which the School Board expects students to follow. These policies and rules are designed to protect the essential rights of students while ensuring an orderly, safe school environment in which students may learn and develop into responsible citizens.

* * * *

Rights and Responsibilities of Students

Students have a right to avail themselves of the educational opportunities offered to them through the Loudoun County Schools. This implies not only a right of access to these opportunities, but also a right to be protected from disruptive influences within the school. Students have a right to complain when other students disrupt a classroom and prevent them from learning.

* * * *

Prohibited Behavior of Students

Students are expected at all times to conduct themselves in accordance with federal, state, and local laws and to obey all policies, rules, and regulations of the School Board and the local school. When a student violates a School Board policy or a school rule, the principal shall take appropriate disciplinary action in accordance with established policy and procedures. Violations of the law will be reported to law enforcement agencies and to parents of any student involved. Students who violate the law in Loudoun County Schools can expect to be prosecuted in court.

* * * *

Acts or Threats of Physical Violence

The use or threat of physical violence against another person will not be tolerated. Such acts or threats may result in arrest and criminal prosecution and will result in school disciplinary action including the possibility of suspension or expulsion.

Acts or threats of physical violence include, but are not limited to, assault, battery, robbery involving force or threat, extortion, fighting, rape, use or possession or any weapon as defined by School Board Policy 8-32 or explosive, setting off fireworks or smoke bombs, making telephone bomb threats or otherwise harming, intimidating, or endangering the physical well-being of any person.

* * * *

Disruption of the School Environment

The environment of each school must be one in which learning can flourish, the security and dignity of each person is protected, and all activities can be conducted in an orderly and productive manner. Severe disruption of this environment may result in arrest and criminal prosecution; less serious instances will be subject to school disciplinary procedures.

Acts of disruption include but are not limited to, riotous or disorderly behavior that interrupts, molests, or disturbs school operation; inciting others to behave in a disorderly manner; defiance of the authority of school personnel; verbal abuse or cursing of others or the use of profane, vulgar, or indecent language; interruption or disturbance of classes, assemblies, activities, or offices of the school; defacing of property with obscene or offensive words or symbols, or with racial or religious epithets; or failure to

leave school premises when directed to do so.

* * * *

Policies Concerning Students

The Loudoun County School Board has adopted policies concerning student conduct. Some of the more important ones are described briefly below. For complete details on these policies, consult the Loudoun County School Board Policies and Regulations in your school library or ask your principal. **Please note: As a result of recent changes in state law and School Board Policy, most violations of the weapons and drug policy will result in expulsion (permanent removal) from school. Please read the weapons (page 11) and drug (page 9) sections of this booklet carefully.**

* * * *

Weapons

No student shall possess any weapon for any reason while under school control or supervision. The term weapon is intended to be construed broadly to cover and include any instrument which could injure, harm, or endanger the physical well being of another person. The term includes but is not limited to:

Category A:

1. Any stun weapon or taser. 2. Any pistol, shotgun, revolver, or other weapon designed or intended to propel a missile of any kind whether loaded or unloaded, whether operable or inoperable. 3. Any dirk, Bowie knife, switchblade, ballistic knife, any knife three inches or longer, or razor,

slingshot, spring stick, brass or metal knuckles, or blackjack. 4. Any flailing instrument consisting of two or more rigid parts connected in such a manner as to allow them to swing freely, which may be known as nunchahka, nun chuck, nunchaku, shuriken, or fighting chain. 5. Any disc of whatever configuration, having at least two points or pointed blades, and which is designed to be thrown as a throwing star or oriental dart. 6. Any weapons of like kind as those enumerated on items 1 through 5 hereof. 7. Any weapon, including a starter gun, which will, or is designed or may readily be converted to, expel a projectile by the action of an explosive or the frame or receiver of any such weapon. 8. Any firearm muffler or firearm silencer. 9. Any •destructive device• defined as (i) any explosive, incendiary, or poison gas, bomb, grenade, rocket: (ii) any weapon, including shotguns; and (iii) any combination of parts either designed or intended for use in converting any device into any destructive device described in this subsection and from which a destructive device may be readily assembled. "Destructive device" shall not include any device which is not designed to redesigned for use as a weapon and which is redesigned for use as a signaling, pyrotechnic, line-throwing, safety, or other similar device.

Category B:

1. Any knife or other instrument or device not included in Category A having as a part thereof a blade designed to cut or a point designed to penetrate. 2. Any instrument or device not included in Category A which has as one of its designed purposes use thereof as a weapon. 3. Any chemical or chemical compound that produces an adverse

effect on the normal functions of the human body. 4. Any instrument, device, or substance not included in Category A which could injure, harm, endanger, or induce fear in another person, including "toy" or "look-alike" weapons.

Any student in violation hereof shall have any such weapon confiscated by school officials and/or any police official. The school official may return the weapon only to the student's parent or guardian after a conference with such parent or guardian.

Any student who violates School Board Policy 8-32 shall be subject to expulsion, or to such lesser disciplinary action, including long-term suspension, as may be deemed appropriate.

Any student who uses or threatens to use a weapon (as herein defined) against another person, or who displays or brandishes an artificial or toy weapon in such a fashion so as to threaten or induce fear in another person shall be reported to the Principal or his/her designee and may be referred to the School Board for expulsion.

* * * *

Disciplinary Procedures

Corrective actions will be taken against students who violate school rules and regulations. Unless School Board policy or regulations directs a specific action to be taken for an offense, the principal will determine the appropriate measure for each case. Minor infractions normally will not result in severe actions unless they are repeated and have not been corrected by lesser measures.

Each school may develop procedures consistent with School Board policies to deal with discipline problems. The principal may designate one or more members of the professional staff of the school to carry out the disciplinary powers assigned to the principal by the School Board. The principal, however, shall maintain the

final authority and responsibility in matters regarding student conduct.

* * * *

Removal From School

Conduct which may constitute cause for removal from school shall include, but shall not be limited to:

8. use or possession or any weapon as defined by School Board Policy 8-32 or explosives; including fireworks, on school property.

* * * *

Short-Term Suspension from School by the Principal

A student may be suspended for as many as ten days for each offense by the principal or designee. Unless the student's presence poses a continuing danger to persons or property or an ongoing threat of disruption, an informal hearing by the principal or designee shall be given the student before a decision to suspend is made. In the informal hearing the student shall be notified of the reason for possible suspension and, if denied by the student, an explanation of the evidence and an opportunity to explain his or her version of the incident. When any student is suspended without prior hearing, the hearing shall be held as soon as possible thereafter.

The Student's parents or guardians shall be notified promptly in writing of the reason for suspension, the length of suspension, and the procedure for appeal.

* * * *

Disciplinary Action by the Division Superintendent

When, in the judgement of the Division Superintendent, disciplinary action beyond the authority of the school principal is required, the Division Superintendent shall implement one of the three following disciplinary measures.

* * * *

Long Term Suspension from School

A student may be suspended from school by the Division Superintendent for a period of time not to exceed the remainder of the current semester and the following school semester. The purpose of long-term suspension is to allow parent(s) or guardian(s) the opportunity to take steps to ensure the Division Superintendent that the student will be able to return to school and not threaten the physical safety of students or others and/or further disrupt the educational environment and the education of other students. Long-term suspension is used in cases of serious misconduct or when other measures, including short-term suspension and involuntary transfer, have failed to bring about a necessary change in student behavior. The procedures for long-term suspension, including rights of appeal, are contained in School Board Policy 8-28.

(2)

Supreme Court, U.S.
FILED
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No. 01-746

IN THE

Supreme Court of the United States

BENJAMIN A. RATNER, a minor, by and through his mother and next friend, BETH HANEY, and BETH HANEY, individually,

Petitioners,

v.

LOUDOUN COUNTY PUBLIC SCHOOLS, EDGAR B. HATRICK, HARRY E. BIBB, JOSEPH L. MAUCK and ROBERTA A. GRIFFITH,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION

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21 pp

COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I. Does the long-term suspension of a public school student who admitted possessing a knife on school property, and who received numerous notices of the charges against him and opportunities to tell his version of events, violate either the Due Process or Equal Protection Clause of the Fourteenth Amendment?

II. Did petitioners waive any claim under the Substantive Due Process Clause of the Fourteenth Amendment by not timely raising that argument below?

III. Did petitioners waive their contention that *Goss v. Lopez*, 419 U.S. 565 (1975), is not the correct standard for reviewing long-term suspensions by not timely raising that argument below?

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REASONS FOR DENYING THE WRIT

The Fourth Circuit affirmed the district court's dismissal of plaintiffs' complaint pursuant to Rule12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief can be granted. The decision below is correct. There is no conflict among the Circuits on this issue, and no occasion for further review.

1. The Fourth Circuit's decision is in accord with other federal and state courts which have considered the issues raised in the present appeal. *See, e.g., Mitchell v. Bd. of Trustees of Oxford Municipal Separate Sch. Dist.*, 625 F.2d 660 (5th Cir. 1980); *Bundick v. Bay City Indep. Sch. Dist.*, 140 F. Supp. 2d 735, 740 (S.D. Tex. 2001); *Brian A. v. Stroudsburg Area Sch. Dist.*, 141 F. Supp. 2d 501 (M.D. Pa. 2001); *Escatel v. Atherton*, No. 96 C 8589, 2001 U.S. Dist. LEXIS 9212 (N.D. Ill. June 29, 2001); *Petrey v. Flaugher*, 505 F. Supp. 1087 (E.D. Ky. 1981); *J.M. v. Webster County Bd. of Educ.*, 207 W.Va. 496, 534 S.E.2d 50 (2000) (citing *Cathe A. v. Doddridge County Bd. of Educ.*, 200 W.Va. 521, 490 S.E.2d 340 (1997)); *Wood by and Through Wood v. Henry County Public Schools*, 255 Va. 85, 495 S.E.2d 255 (1998); *Kolesnick v. Omaha Public Sch. Dist.*, 251 Neb. 575, 558 N.W.2d 807 (1997); *James v. Unified Sch. Dist. No. 512*, 899 F. Supp. 530 (D. Kan. 1995); *Clinton Municipal Separate Sch. Dist. v. Byrd*, 477 So.2d 237 (Miss. 1985). State and federal courts have held that mandatory school disciplinary policies are constitutional and that courts should not impose their judgment in place of the school officials'

merely because the court may believe that the punishment is harsh, unwise or unfair.[1]

The Petitioners' reliance on *Seal v. Morgan*, 229 F.3d 567 (6th Cir. 2000), is misplaced.[2] In *Seal*, the Sixth Circuit held that a student might state a claim for a substantive due process violation if the student did not knowingly possess a weapon, *see id.* at 575-580, because "suspending or expelling a student for weapons possession, even if the student did not knowingly possess any weapon, would not be rationally related to any legitimate state interest." *Id.* at 575. The issue in the *Seal* case was whether the student knowingly violated

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[1] In fact, the Virginia statute on which the county school board's policy was based, *see* VA. CODE ANN. § 22.1-277.01 (Michie 2000), was specifically found constitutional by the Virginia Supreme Court. *See Wood by and Through Wood v. Henry County Public Schools*, 255 Va. 85, 495 S.E.2d 255 (1998). That statute has since been repealed and reenacted. *See* VA. CODE ANN.§ 22.1-277.07 (Michie 2001).

[2] Petitioners also argue that the present decision is at odds with the Fourth Circuit's previous opinion in *Hall v. Tawney*, 621 F.2d 607 (4th Cir. 1980), but it is not. In *Tawney*, the Fourth Circuit considered whether a student could state a claim for a violation of substantive due process where the student was alleged to have been subjected to a severe beating by school officials. Comparing corporal punishment cases to police brutality cases, the Fourth Circuit said, "[T]he substantive due process inquiry in school corporal punishment cases must be whether the force applied caused injury so severe, was so disproportionate to the need presented, and was so inspired by malice or sadism rather than a merely careless or unwise excess of zeal that it amounted to a brutal and inhumane abuse of official power literally shocking to the conscience." *Id.* at 613. The decision was based on the student's right to personal privacy and bodily security. *See id.* The present case, which does not involve corporal punishment, is in no way in conflict with the *Tawney* decision.

the rule.[3] In the present case, based on Ratner's own allegations, there is no dispute that he knowingly possessed the knife and knowingly choose to place the knife in his locker rather than turn it over to school officials. *See* Complaint, App. at F4, ¶ 13. Ratner was knowingly and intentionally in violation of the school's weapons policy. As such, the school officials' decision to suspend Ratner was rationally related to legitimate state interests and is not properly the subject of judicial review. There is no conflict between the Fourth and Sixth Circuits' opinions.[4]

2. Contrary to the Petitioners' arguments, Loudoun County School Board Policy § 8-32 is not a "zero tolerance" policy either on its face or as it was applied to Ratner.[5] The Policy allows school officials to consider the

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[3] Contrary to Petitioners' argument, the *Seal* court's decision did not hinge in any way on whether the student intended to harm anyone with the weapon, but rather whether he was knowingly in possession of the weapon.

[4] As the Sixth Circuit said, "A school board can, of course, disbelieve the student's explanation and conclude that the student knowingly violated school policies. If that occurs, due process would be satisfied as long as the procedures afforded the student were constitutionally adequate and the conclusion was rational." *Seal v. Morgan*, 229 F.3d 567, 579 (6th Cir. 2000). The only conclusion to be reached from the facts as pled by Ratner is that he knowingly violated the policy, and therefore, even under the *Seal* court's analysis, the school officials' actions were rational and constitutional.

[5] The Fourth Circuit acknowledged that Sec. 8-32 is not a "zero tolerance" policy. *See* Opinion, App. at B4, n.2. The Virginia Supreme Court also recognized in *Wood by and Through Wood*, 255 Va. at 92-93, 495 S.E.2d at 259, that "[n]either the school division's policies nor the Federal Gun-Free School Act with which Code § 22.1-277.01(a) complies, divests the School Board of its authority to impose a less severe punishment than expulsion."

facts and circumstances of each case and fashion an appropriate punishment. The Policy states,

> Penalties for Violation. Any student who violates this policy with respect to a Category A weapon shall be expelled from Loudoun County Public Schools (the School Board may, however, determine, based on the facts of the particular case, that special circumstances exist and another disciplinary action or term of expulsion is appropriate). Any student in violation of any other terms of this policy shall be subject to expulsion from Loudoun Couny Public Schools, or to such lesser disciplinary action, including long-term suspension, as may be deemed appropriate.

See Appendix at A1.[6] Furthermore, in the student handbook relied on by the Petitioners, students were warned that "**most violations of the weapons...policy will result in expulsion (permanent removal) from school**" and admonished to "**read the weapons...section[] of this booklet carefully.**" *See* Student Handbook, App. at G4 (emphasis in original). Under the "Weapons" policy section, students were told, "No student shall possess any weapon *for any reason* while under school control or supervision" and, further, that "[a]ny student who violates School Board Policy 8-32 shall be subject to expulsion, or to such lesser disciplinary action, including long-term suspension, as may be deemed appropriate." *Id.* at G6 (emphasis added).

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[6] School Board Policy § 8-32 is attached as an addendum to this brief at A1. The Petitioners did not attach a copy of the policy to their brief, but rather attached a copy of the student handbook. *See* App. at G1.

In the case of Ratner, based on the allegations in his own complaint, the policy required that students found in possession of a weapon be expelled for a minimum of one year unless special circumstances existed. *See* Sec. 8-32, App. at A1. Accordingly, the school administrators found that special circumstances existed in this case and, using the discretion allowed by the Policy, imposed a lesser punishment of a long-term suspension for the remainder of the term. *See* Complaint, App. At F5, ¶ 18. Ratner disagrees with this punishment, which, in his opinion, was harsh and "certainly some form of intolerance." Petition at 22, n.5. Ratner has petitioned this Court to consider the constitutionality of "zero tolerance" policies when the statutory language, as well as the allegations of his Complaint, do not establish that such a policy was applied by these school officials. As such, the petition should be denied.

3. There is no constitutional violation. The allegations of Petitioners' complaint, when taken as true, failed to state a claim upon which relief can be granted. *See* Fed. R. Civ. P. 12(b)(6). *See also, e.g., Estate Const. Co. v. Miller & Smith Holding Co., Inc.*, 14 F.3d 213 (4th Cir. 1994); *District 28, United Mine Workers of America, Inc. v. Wellmore Coal Corp.*, 609 F.2d 1083 (4th Cir. 1979).

Primarily, Petitioners argue that the lower courts failed to consider whether the complaint stated a cause of action for a violation of substantive due process under the Fourteenth Amendment. *See* Petition at 9. However, this issue is not properly before this Court because Petitioners did not raise their substantive due process argument until their petition for rehearing to the Fourth Circuit. Petitioners did not argue any violation of substantive due process either before the trial court or in their initial appeal to the Fourth

Circuit. Having failed to timely raise their substantive due process claim, the Petitioners' present argument to this Court is improper. *See, e.g., Carden v. Arkoma Assoc.*, 494 U.S. 185, 197 (1990); *Canton v. Harris*, 489 U.S. 378, 386 n.5 (1989); *FTC v. Grolier Inc.*, 462 U.S. 19, 23 n.6 (1983).

Furthermore, the allegations of Petitioners' complaint failed to state a claim for a violation of substantive due process. This Court has stated that a student does not have a fundamental right to a public education. *See San Antonio Sch. Dist. v. Rodriguez*, 411 U.S. 1, 33-37 (1973); *see also, e.g., Sellers by Sellers v. School Bd. of City of Manassas, Va.*, 141 F.3d 524, 530-31 (4th Cir. 1998); *Kolesnick*, 251 Neb. at 581-82, 558 N.W.2d at 813. Therefore, "the appropriate level of scrutiny is the rational basis test." *See id.* at 582; 558 N.W.2d at 813. "In the context of school discipline, a substantive due process claim will succeed only in the 'rare case' when there is 'no rational relationship between the punishment and the offense.'" *Seal*, 229 F.3d at 575. *See also, e.g., Bundick*, 140 F. Supp. 2d at 740; *Escatel*, 2001 U.S. Dist. LEXIS at **23-25.

There is a rational basis for the policy at issue.[7] School administrators have an interest in the safety of students, as well as maintaining order and discipline in their schools. School officials have a rational interest in seeing

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[7] Petitioners did not allege that the punishment was not rationally related to a legitimate state interest. *See* Complaint, App. at F10, ¶ 44. Petitioners allege that the suspensions "bore no rational relationship to, and [were] imposed without due consideration of the circumstances surrounding the alleged misconduct, and thus were arbitrary and capricious and imposed in violation of Mr. RATNER's right to due process." *Id.* Moreover, these are merely conclusions of law, which are not binding on this Court. *See Estate Const. Co. v. Miller & Smith Holding Co., Inc.*, 14 F.2d 213, 217-18 (4th Cir. 1994).

accidentally or on purpose. They have a rational interest in not allowing a student to determine for himself when he should or should not comply with the school's rules and when he should or should not turn a weapon, which comes into his possession for any reason, over to school administrators. The school's decision to enact a policy which did not allow students to possess weapons *for any reason* while on school property is rationally related to these legitimate interests. There is no violation of the Substantive Due Process Clause of the Fourteenth Amendment.

4. Petitioners failed to state a claim for a procedural due process violation. Petitioners argue that the lower courts erred by applying the standard of review established by this Court in *Goss v. Lopez*, 419 U.S. 565 (1975), to both Ratner's short-term and long-term suspensions. *See* Petition at 17. Petitioners assert that the appropriate standard for Ratner's long-term suspension should have been the three-factor test of *Mathews v. Eldridge*, 424 U.S. 319 (1976), not *Goss v. Lopez*, 419 U.S. 565 (1975). *See id.* Petitioners cite a single footnote in a district court opinion in Alabama for this proposition. *See id.* (citing *Craig v. Selma City Sch. Bd.*, 801 F. Supp. 585, 591 (S.D. Ala. 1992)). This argument was not timely raised by Petitioners to the lower courts. *See, e.g., Carden*, 494 U.S. at 197; *Canton*, 489 U.S. at 386 n.5; *FTC* , 462 U.S. at 23 n.6. The Petitioners did not argue to the trial court or the appellate court that any standard other than the *Goss* standard applied to Ratners' suspensions. This argument is, therefore, not properly before this Court.

Furthermore, in *Goss v. Lopez*, 419 U.S. 565 (1975), this Court established a procedural due process framework that lower courts have consistently used to consider the constitutionality of school disciplinary actions. *See, e.g.,*

Bundick, 140 F. Supp. 2d at 740; *James*, 899 F. Supp. at 535-36. *Goss* requires that students must receive some kind of notice of the charges against them and some kind of hearing in which they can tell their version of events. *See Goss*, 419 U.S. at 581. Based on the allegations in his complaint, Ratner's suspensions met the requirements for procedural due process.

"[N]ot every departure from a state agency's stated or customary procedures constitutes a denial of constitutionally guaranteed procedural due process." *Jones v. Bd. of Governors of Univ. of North Carolina*, 704 F.2d 713, 717 (4th Cir. 1983). Indeed, as a general rule, "the source of procedural guarantees is to be found solely in the due process clause rather than in any specific procedures provided by the state." *Id.* Any such procedural deficiencies will rise to the level of a constitutional violation only to the extent that they constitute significant departures from constitutionally based guarantees—here, the right to notice of the charges against Ratner and an opportunity to be heard as to those charges. *See id. See also Hillman v. Elliot*, 436 F. Supp. 812, 817 (W.D. Va. 1977) (holding that defendants who substantially comply with their own disciplinary rules satisfy the due process clause). None of the various allegations of violations of the Virginia Code or school board policy, as alleged in Petitioners' complaint, amounts to a departure so significant or substantial so as to deny Ratner the notice and hearing which he was due under the Fourteenth Amendment.[8]

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[8] Petitioners state that they "alleged that numerous procedural safeguards imposed by the Virginia Code to govern suspensions were not adhered to, to Petitioners' prejudice." Petition at 5. The complaint does not allege any facts to support Petitioners conclusion here that they were prejudiced by any alleged violation of state procedures. In fact, Petitioners' complaint alleges that the state procedures were inadequate. *See* Complaint, App. at F10, ¶¶ 45-47.

Although Petitioners say that "[c]ertiorari is appropriate to allow the Court an opportunity to clarify for public school administrators, parents and students what process is due students in imposing long-term suspensions," Petition at 17-18, Petitioners do not articulate what constitutional process—under any standard—that Ratner was denied. Based on his own allegations, Ratner received numerous notices of the charges as well as opportunities to tell his version of events. *See* Mem. Op., App. at E5-E6. The school officials chose to mitigate Ratner's punishment by imposing a long-term suspension rather than expulsion. Petitioners continue to disagree with the severity of the punishment imposed, which in their opinion was too harsh, but there is no constitutional violation. The trial court, affirmed by the Fourth Circuit, correctly concluded that "Ratner...received all the process due him." Mem. Op., App. at E6. *See also* App. at B5.

5. Petitioners failed to state a claim for a violation of equal protection. The Petition does not set out with any specificity why the lower courts erred in dismissing this claim. The Petitioners failed to allege that the school officials' actions were based on a discriminatory intent, or any other improper purpose. *See Sylvia Development Corp. v. Calvert County, Md.*, 48 F.3d 810, 819 (4th Cir. 1995). Below, the Petitioners relied on this Court's recent opinion in *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000), to argue that they were not required to allege an improper purpose to state an equal protection claim. The *Olech* decision does not relieve plaintiffs from the burden of alleging discriminatory intent. *See, e.g., Hilton v. Wheeling*, 209 F.3d 1005 (7th Cir. 2000), *cert. denied* 148 L. Ed. 2d 678 (2001); *Bryan v. The City of Madison, Mississippi*, 213

F.3d 267 (5th Cir. 2000); *Shipp v. McMahon*, 234 F.3d 907 (5th Cir. 2000).

The thrust of Petitioners' argument is that the school officials acted pursuant to, and in accordance with, an adopted and published policy. Ratner, a student, simply does not agree with the punishment he received. It is not improper for school officials to enforce a rule with which a student does not agree, especially in light of the fact that it is undisputed that Ratner was knowingly in violation of the rule against possessing a knife on school property.

6. As this Court has said, "It is not the role of the federal courts to set aside decisions of school administrators which the court may view as lacking a basis in wisdom or compassion." *Wood v. Strickland*, 420 U.S. 308, 326 (1975). *See also Bundick*, 140 F. Supp. 2d at 740. Citing numerous newspaper articles, as well as scholarly and legal publications, Petitioners argue that the "issue of 'Zero Tolerance' policies generally, and Petitioners' case specifically, has been the subject of immense commentary in the media and public discussion recently, most of it negative toward such policies." Petition at 18. It is not the role of courts to weigh in on issues merely because they are the subject of public discussion and debate. In this case, there is no constitutional violation. *See Mitchell*, 625 F.2d at 664 ("If the plaintiffs believe the rule mandating expulsion for the bringing of weapons to school is too harsh, their remedy is to persuade the School Board to change it."). Debate and discussion over the wisdom and appropriateness of school disciplinary policies is properly confined to legislatures and school boards, not courtrooms.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari filed by Petitioners Benjamin A. Ratner and Beth Haney should be denied.

Respectfully submitted,

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Addendum

STUDENTS

§8-32 Weapons

Possession or use of weapon by a student while under the control or supervision of school system personnel or on school property is prohibited. The term "weapon" is intended to be construed broadly and includes any instrument or device which, by its design or use is capable of causing injury, harm, or threat of injury, harm, or threat of injury or harm to the physical well-being of another person. A "weapon" as used in this policy includes, but is not limited to, the following:

Category A:

1. Any stun weapon or taser;
2. Any pistol, shotgun, rifle, revolver, or other weapon designed or intended to propel a missile of any kind whether loaded or unloaded, whether operable or inoperable;
3. Any dirk, Bowie knife, switchblade, ballistic knife, any knife with a blade three inches or longer, or razor, slingshot, spring stick, brass or metal knuckles, or black jack;
4. Any flailing instrument consisting of two or more rigid parts connected in such a manner as to allow them to swing freely, which may be known as nunchahka, nun chuck nunchaku, shurlken, or fighting chain;
5. Any disc of whatever configuration, having at

least two points or pointed blades, and which is designed to be thrown as a throwing star or oriental dart;

6. Any weapons of like kind as those enumerated in items 1 through 5 hereof;
7. Any weapon, including a starter gun, which will, or is designed or may readily be converted to, expel a projectile by the action of an explosive or the frame or recalver of any such weapon;
8. Any firearm muffler or firearm silencer; or
9. Any "destructive device" defined as (1) any explosive, incendiary, or poison gas, bomb, grenade, rocket; (2) any weapon, including shotguns; and (3) any combination of parts either designed or intended for use in converting any device into any destructive device described in this subsection and from which a destructive device may be readily assembled. "Destructive device" shall not include any device which is not designed or redesigned for use as a weapon and which is redesigned for use as a signaling, pyrotechnic, line-throwing, safety, or other similar device.

Category B:

1. Any knife or other instrument or device, not included in Category A, having as a part thereof a blade designed to cut or a point designed to penetrate.
2. Any instrument or device, not included in Category A, which has as one of its designed purposes use thereof as a weapon.
3. Any chemical or chemical compound that produces an adverse effect on the normal functions of the human body.
4. Any instrument, device, or substance, not included in Category A, which could injure, harm, endanger, or induce fear in another person. Including "toy" or "look-alike" weapons.

Penalties for Violation. Any student who violates this policy with respect to a Category A weapon shall be expelled from Loudoun County Public Schools (the School Board may, however, determine, based on the facts of the particular case, that special circumstances exist and another disciplinary action or term of expulsion is appropriate). Any student in violation of any other terms of this policy shall be subject to expulsion from Loudoun County Public Schools, or to such lesser disciplinary action, including long-term suspension, as may be deemed appropriate.

(3)

Supreme Court, U.S.
FILED
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NO. 01-746

IN THE
SUPREME COURT OF THE UNITED STATES

BENJAMIN A. RATNER AND BETH HANEY,
Petitioners,

v.

LOUDOUN COUNTY PUBLIC SCHOOLS,
EDGAR B. HATRICK, HARRY E. BIBB,
JOSEPH L. MAUCK, AND ROBERTA GRIFFITH,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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January 11, 2002

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioners Ben Ratner and Beth Haneyrespectfully submit their reply brief in support of their petition to this Honorable Court for a writ of certiorari to review the decision of the United States Court of Appeals for the Fourth Circuit in *Ratner v. Loudoun County Public Schools, et al.*, No. 00-2157 (July 30, 2001). Petitioners seek review of the Court of Appeals' affirmance of the dismissal of their lawsuit for failure to state a claim pursuant to FEDERAL RULES OF CIVIL PROCEDURE R. 12(b)(6) based upon the lower courts' determination that no violation of the due process and equal protection guarantees of the Fourteenth Amendment occurs when a public school student is denied his state-created right to public education pursuant to an arbitrary and capricious "Zero Tolerance" disciplinary policy.

I. PETITIONERS PLED THEIR SUBSTANTIVE DUE PROCESS CLAIM AND ARGUED AND PRESERVED THE CLAIM IN THE COURTS BELOW.

Respondents allege that Petitioners failed to raise their claim of denial of substantive due process in the courts below. Brief in Opposition at 5. That is simply not so. The substantive due process claim was pled in Petitioners' complaint[1] and raised at

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[1] *See* Petitioners' Complaint, filed June 8, 2000, Appx. to Petition at F1-F2, ¶¶ 1-2 (stating claims arising under the Fourteenth Amendment to the United States Constitution); F10, ¶¶ 44, 47-48

every level in the proceedings below. Petitioners' First Cause of Action alleged violations of the right to due process, and specifically recited:

> 44. Each of the suspensions constituted grossly excessive punishment that bore no rational relationship to, and was imposed without due consideration of the circumstances surrounding the alleged misconduct, and thus were arbitrary and capricious and imposed in violation of Mr. RATNER's right to due process.
>
> * * * *
>
> 47. State procedures are inadequate to protect students' rights of due process because suspensions are imposed pursuant to a "zero tolerance" policy that precludes consideration of the facts and circumstances of the particular student's conduct.
>
> 48. As a direct and proximate result of the wrongful conduct of the Defendants, all of which occurred under the color of state law, Mr. RATNER was deprived of his property right to a free, public education without due process of law, causing him to be impeded in his educational progress, to suffer injury to his reputation and mental well-being, to be ridiculed by the teachers and staff of LCPS, to be separated from his peers, and to incur unwarranted out-of-pocket expenses in meeting Mr. RATNER's educational needs.

Id. No more exacting articulation of the due process standard

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(see text *infra*).

could reasonably be required of a civil claimant, particularly in view of this Court's admonition in *Leatherman v. Tarrant County Narcotics Intelligence*, 507 U.S. 163, 167-69 (1993), that notice pleading requirements "make no more demanding rule for pleading a complaint under [42 U.S.C.] § 1983 than for pleading other kinds of claims for relief."[2]

Petitioners' substantive due process claim was advanced in briefing in opposition to Defendants' FED. R. CIV. PROC. 12(b)(6) motion to dismiss as well,[3] a fact recognized by the District Court in its Memorandum Opinion. *Id.* at 5 ("plaintiffs contend that the suspensions constituted grossly excessive punishment that bore no rational relationship to and without due consideration of the circumstances"). While the substantive and procedural due process arguments were interspersed, Petitioners specifically argued that the policy was arbitrary and irrational on its face and as applied, and that Petitioner Ratner was deprived of his right to a public education in significant part because he refused to be coerced into professing trust in the school's ability to respond to his suicidal friend's needs. Memorandum in Opposition to Motion to Dismiss at 16 (citing

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[2] [A]ll the Rules require is "a short and plain statement of the claim" that will give the defendant fair notice of what the plaintiff's claim is and the grounds on which it rests.... Such simplified "notice pleading" is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the Rules to define more narrowly the disputed facts and issues.

Conley v. Gibson, 355 U.S. 41, 47 (1957). *Accord Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974); *Hishon v. King & Spaulding*, 467 U.S. 71, 73 (1984).

[3] *See* Memorandum in Opposition to Motion to Dismiss at 12-16.

several Fourteenth Amendment due process case authorities). Unfortunately, because the District Court summarily dismissed the Complaint without permitting oral argument, counsel for Petitioners had no opportunity to expand upon and discuss the claim before the court. The claim was renewed before the Fourth Circuit Court of Appeals.[4] That the District Court and the Fourth Circuit chose to address Petitioner's due process claims as if they arose principally under the procedural component of that clause is not the fault of Petitioners.

Petitioners' allegation that governmental actions that arbitrarily and capriciously deprived them of a state-created property interest in education gave rise to a right of redress under the substantive due process component of the Fourteenth Amendment is well-grounded in this Court's precedent, and in the case law of the Circuits. *See Newman v. Commonwealth*, 884 F.2d 19, 26 (1st Cir. 1989) (holding that right of teacher to be free from *arbitrary and capricious* nonrenewal of contract was sufficiently established to deprive defendant university officials of qualified immunity); *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974); *Dent v. West Virginia*, 129 U.S. 114, 123 (1889); *Nash v. Auburn Univ.*, 812 F.2d 655, 667 (11th Cir. 1987) ("Not only does the due process clause of the Fourteenth Amendment provide procedural protections, it provides a guarantee against *arbitrary decisions* that would impair appellants' constitutionally protectable interests"); *Dunn v. Fairfield Comm. High School Dist. No. 225*, 158 F.3d 962 (7th Cir. 1998) (policy under which students were suspended would violate substantive due process if it mandated "*wholly arbitrary*" results); *Bateson v. Geisse*, 857 F.2d 1300, 1303 (9th Cir. 1988); *Brenna v. Southern Colorado State College*, 589 F.2d 475,

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[4] See Opening Brief at 14-15.

476-77 (10th Cir. 1978); *Jeffries v. Turkey Run Consolidated School Dist.*, 492 F.2d 1, 3-4 (7th Cir. 1974); *Seal v. Morgan*, 229 F.3d 567, 580 (6th Cir. 2000), and cases cited in Petition for Writ of Certiorari at 13-14. The District Court was obliged to take the allegations of Petitioners' Complaint as true, including the allegations that Respondents acted "arbitrarily" and "irrationally," which went to Respondents' state of mind and intent. "[T]he determination of whether the Board [of education's] action was rationally related to a legitimate state interest is one of law and would be made by the court. *The question of what the Board did, and why, would be questions of fact for the jury.*" *Seal v. Morgan*, 229 F.3d at 580, citing *Sameric Corp. v. City of Philadelphia*, 142 F.3d 582, 591 (3rd Cir. 1998). Consequently, the District Court committed clear error in dismissing the Complaint without permitting Petitioners an opportunity to have discovery on Respondents' irrational animus behind its policy and actions.

II. LACKING GUIDANCE FROM THE SUPREME COURT, THE CIRCUIT COURTS OF APPEALS ARE IN DISAGREEMENT OVER WHETHER THE STANDARD *OF MATHEWS V. ELDRIDGE* APPLIES TO LONG-TERM SUSPENSIONS OR THE MORE LENIENT STANDARD *OF GOSS V. LOPEZ.*

The Sixth Circuit Court of Appeals observed nearly fifteen years ago, in a case involving a procedural due process challenge

to an expulsion from a public high school:[5]

> We note as a general matter that, while the Supreme Court has addressed the issue of what process is due public school students in short suspension cases, *Goss v. Lopez*, the Court has specifically left open the question of what process is due in long-term suspensions (suspensions exceeding ten days) and expulsion cases. In the Court's words, "We should also make it clear that we have addressed ourselves solely to the short suspension, not exceeding ten days. Longer suspensions or expulsion for the remainder of the school term, or permanently, may require more formal procedures."

Newsome v. Batavia Local School Dist., 842 F.2d 920, 923 (6th Cir. 1988), quoting *Goss v. Lopez*, 419 U.S. 565, 584 (1975).

"Without the aid of Supreme Court authority directly on point, we are left with resolving the procedural due process issues presented in this appeal under the more general rubric of *Mathews v. Eldridge* [424 U.S. 319 (1976)]," the court concluded. *Id.* The Sixth Circuit went on to analyze the one-semester expulsion of the plaintiff pursuant to the *Mathews* three-factor framework, 424 U.S. at 924. *See also Paredes v. Curtis*, 864 F.2d 426 (6th Cir. 1988) (declining to apply *Mathews* standard to 10-day suspension; "*Newsome* was an expulsion case and therefore would require more formal procedures").

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[5] Although Respondent repeatedly characterizes the one-semester exclusion of Petitioner as a "suspension," it is more appropriately referred to as an "expulsion," as the *Newsome* court did. Whether it is labeled a "suspension" or an "expulsion" has no bearing on the due process standard to be applied, however.

Beyond implicit suggestions in two cases that student claimants should be afforded more process than the 10-day suspension addressed in *Goss* when claimants are deprived of educational opportunity for reasons other than academic performance, *see Univ. v. Missouri v. Horowitz*, 435 U.S. 78, 86 (1978); *Univ. of Michigan v. Ewing*, 474 U.S. 214 (1985), the Court in the quarter-century since *Goss* still has not defined for the Circuit Courts and educators "what process is due" in such long-term suspension or expulsion cases. Lacking adequate direction, the Circuit Courts of Appeals have taken diverse approaches. Like the Sixth Circuit, the First Circuit applied the *Mathews* standard to a college student's semester suspension for abusive conduct, and in assessing the balance of interests noted, "The interests of students in completing their education, as well as avoiding unfair or mistaken exclusion from the educational environment, and the accompanying stigma are, of course, paramount." *Gorman v. Univ. of Rhode Island*, 837 F.2d 7, 14 (1st Cir. 1988); *cf. Rose v. Nashua Bd. of Educ.*, 679 F.2d 279, 282 (1st Cir. 1982). The Third Circuit, addressing a sixty-day athletic suspension of a talented high school football player, held that the *Goss* standard of "notice and an opportunity to be heard" was sufficient under the circumstances. *Palmer v. Merluzzi*, 868 F.2d 90, 95 (3rd Cir. 1989). The Fourth Circuit, in contrast to the panel's decision in Petitioner's case, previously held in a university expulsion case that *Mathews* supplied the correct procedural standards, and cited with approval the Fifth Circuit's decision in *Dixon v. Alabama State Board of Educ.*, 294 F.2d 150, 159 (5th Cir. 1961) (reversing the dismissal of college students who protested segregation for lack of procedural safeguards, including access to witnesses and a report of the charges and the statements upon which they are based), which Petitioners urged to the court of appeals as the correct

articulation of the process due for a long-term suspension.[6] With Petitioner's case, the Fourth Circuit's position is now in doubt.[7]

The issue of which standard applies is critical in a case such as Petitioners', which alleges numerous procedural defects in the process afforded their appeal of a long-term suspension. These defects include failure at any time to provide a report of the facts giving rise to the suspension, Pet. at 7-8 (*cf. Dixon, supra*, at 159, requiring report of charge, witnesses and testimony); and failure to inform Petitioners of their right to appeal to the school board, and their right to appeal the school board's decision to the circuit court. *Id.* The latter failure resulted in the loss of Petitioners' right to appeal.

> "'The fundamental requisite of due process of law is the opportunity to be heard." *Grannis v. Ordean*, 234 U.S. 385, 394 [1914]. This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

Dusenbery v. United States, Sup.Ct. No. 00-6567 (January 8, 2002) (Ginsburg, J., dissenting). By failing to find in *Goss* or *Mathews* a requirement that due process afford these basic protections of notice and a report of the charges in the case of a semester-long suspension, the Fourth Circuit underscored the lack

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[6] Opening Brief at 16.

[7] The Eleventh Circuit has also acknowledged the *Dixon* standard with approval as precedent on that Court of Appeals. *Nash v. Auburn Univ.*, 812 F.2d 655, 660 (11th Cir. 1987).

of clarity among the Circuits regarding the scope of *Mathews'* application to long-term suspensions. That longstanding confusion warrants review by this Court.

CONCLUSION

For the reasons set forth above, Petitioners respectfully request that their petition be granted, and that certiorari issue to the United States Court of Appeals for the Fourth Circuit to review the appeals court's decision affirming the dismissal of their lawsuit against Respondents.

Respectfully submitted,

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